Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

October Term, 1996

JACKSON SQUARE ASSOCIATES,
a New York Limited Partnership,
Petitioner,

vs.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Buffalo Office-Region II,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR WRIT OF CERTIORARI

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106 pp

QUESTIONS PRESENTED

1. Did the Court of Appeals sanction a District Court decision which made findings of fact and thereupon granted summary judgment dismissing the petitioner's breach of contract cause of action upon its Housing Assistance Payments (HAP) contract as modified by a writing subscribed by the Assistant Secretary of the U.S. Department of Housing and Urban Development (HUD) so as to deprive petitioner of its right to a jury trial pursuant to the 7th Amendment to the U.S. Constitution?

2. Did the Court of Appeals sanction a District Court decision which decision failed to enforce a decision by HUD's Assistant Secretary which was contemporaneously explained by him as provided in *Camp vs. Pitts*, 411 U.S. 138 (1973) and permit a reversal of the Assistant Secretary's decision supported by a post-hoc rationalization eight years later by agency staff, a kind of agency action that was viewed critically by *Citizens to Preserve Overton Park vs. Volpe, Secty. of Trans.*, 401 U.S. 420 (1970)?

3. Did the Court of Appeals sanction a District Court decision which decided that an Act of Congress which empowers an agency Secretary to find special circumstances and to make a determination (42 USC §1437f(c)(1)does not prevent inferior agency staff from overruling or departing from the Secretary's decision unless the Act of Congress prohibits the inferior agency staff from doing so?

4. Did the Court of Appeals sanction a District Court decision which permitted agency staff to void an automatic annual adjustment factor (AAAF) previously made as an amendment to petitioner's housing assistance payments (HAP) contract without the comparability study of unassisted rents required by this Court in *Cisneros vs. Alpine Ridge Group*, 508 U.S. 10 (1993)?

5. Did the Court of Appeals sanction a District Court decision which held irrelevant unrefuted evidence of racial discrimination by the key HUD agency staff person who initiated the rejection of the decision by Assistant Secretary Simons rather than shifting the burden of proof that the agency staff decision was not racially motivated to the respondent as provided by *Village of Arlington Heights vs. Metro Housing Dev.*, 429 U.S. 252 (1977).

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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Petitioner Jackson Square Associates, L.P., respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered March 6, 1997 affirming the judgment of the United States District Court for the Western District of New York which dismissed petitioner's action as to all claims.

OPINIONS BELOW

The summary order of the United States Court of Appeals for the Second Circuit, Dated March 6, 1997, affirmed the judgment of the District Court (App. A1-A4).

The United States District Court for the Western District of New York, the Honorable John T. Curtin, District Judge, granted the motion of respondent U.S. Department of Housing and Urban Development (hereafter HUD) for summary judgment (Fed. Rules of Civ. Prac. 56) to dismiss the cause of action of petitioner, Jackson Square Associates, L.P. (hereafter Jackson Square) for an APA judicial review per Title 5 U.S.C. Sec. 706(2)(A) (App. A5-A28) and to dismiss the petitioner's cause of action for breach of its HAP contract as modified for failure to state a cause of action (App. A29-A37).

JURISDICTION

Judgment of the Second Circuit was entered on March 6, 1997.

This Court obtains jurisdiction to consider this petition from a final judgment of a Court of Appeals pursuant to Title 28 U.S.C. Sec. 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The U.S. Constitution Amendment VII states:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

The U.S. Constitution Amendment XIV, Section 1, states:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The text of Title 42 U.S.C. 1437 Sec. 1437f(c)(1) (1980) and the text of 24 CFR Sec. 880.110 (1980) and 24 CFR Sec. 880.204 (1980) are reproduced in the Appendix at A52-A57.

STATEMENT OF THE CASE

Petitioner Jackson Square entered into a housing assistance payments (HAP) contract with HUD for a 160 unit section 8 project (42 U.S.C. Sec. 1437f). A $45,098 processing error was discovered in the HAP contract by the joint effort of HUD Engineering and petitioner (App. A10, A11). The waiver or modification of the HAP contract to correct the processing error required the approval of the Assistant Secretary of HUD for housing because the correction required adjusted contract rents in excess of 10% of fair market rent. 42 U.S.C. 1437f(c)(1) and 24 CFR Sec. 880.204(B)(1)(ii) (App. A52-A53, A56-A57).

Assistant Secretary Simons approved a HAP contract modification waiving and amending the original contract rents in the amount of $24 per unit per month per year, totaling $45,098 per year (App. A64-A65) in response to a request from the Buffalo field office for such contract modification (App. A61-A63).

However, after the Assistant Secretary's decision, the agency staff refused to pass on to petitioner the $45,098 modification approved by him and reduced it to $13,450 per year, an amount equal to the Automatic Annual Adjustment Factor (AAAF), a HAP contract amendment granted petitioner Jackson Square six months prior to Assistant Secretary Simons' decision (App. A11-A12).

Petitioner Jackson Square brought an action for common law breach of contract on the HAP contract as modified by Assistant Secretary Simons' written decision and for an Administrative Procedure Act (APA) review pursuant to Title 5 USC §706(2)(A). HUD moved for summary judgment (FR Civ.P. 56). The District Court granted the motion and decided as a matter of law that a

contract modification had not taken place (App. A35) despite the Assistant Secretary's writing, as required by the HAP contract (App. A35).

Proceeding further, the District Court assumed a contract modification arguendo and decided as a matter of law that the Assistant Secretary's decision was unambiguous, that the agency staff version of the Secretary's written decision was correct (App. A36) and that petitioner did not state a cause of action for breach of contract.

Petitioner contended that the Assistant Secretary's decision modified the original HAP contract and adjusted the original contract rents. The agency staff contended the Secretary's decision adjusted rents as of the date thereof, August 29, 1980, after the end of the first year annual automatic adjustment (AAAF). Secretary Simons' decision referred to the original contract rents three times (App. A64-A65) and expressly referred to the field office request to correct a processing error of $45,098 per annum ($24 per month for 160 units per year) (App. A61-A63).

Petitioner's extrinsic evidence consisting of the Assistant Secretary's testimony (App. A70-A72) and the affidavit of Frank Levin, general partner of petitioner (App. A73-A81), demonstrated that the Simons' writing was ambiguous.

Six months prior to the Assistant Secretary's decision, after a year of operation, petitioner's HAP contract had been amended by an AAAF increase of $15 per month per unit (App. A12, A76).

The Secretary adjusted the original contract rents of $24 per unit per month (App. A65). Agency staff contended he intended to cancel the previously granted

$15 per month AAAF or he intended to limit the processing error correction to $9 per unit per month, the amount in excess of the AAAF increase instead of granting petitioner a full $24 per month per unit correction of the processing error (App. A13-A17).

The Secretary's decision, a one page memorandum and his intent is the contract issue (App. A64-A65). His contemporaneous explanation of his decision is contained in his deposition. He testified he intended his decision to be a final decision (App. A70), which he expected would be followed (App. A72) and that the issues raised therein had nothing to do with the AAAF factor (App. A72).

Petitioner's second cause of action for an APA Judicial review per 5 U.S.C. Sec. 706(2)(A) was that the determination of Assistant Secretary Simons required by Title 42 U.S.C. Sec. 1437f(c)(1) and by 24 CFR 880.204(B)(1)(ii) was final informal adjudicatory action.

Shortly after Assistant Secretary Simons' decision, agency staff reported to petitioner Jackson Square that the Washington decision had failed to correct the full $45,098 processing error and that Secretary Simons had deducted the previous AAAF. That was untrue. Ultimately, petitioner obtained the relevant documents through FOIA and renewed its demand for performance of Secretary Simons' decision (App. A13-A17).

Eight years after Secretary Simons' decision, Buffalo agency staff, with all the documents now disclosed, made the new argument that the rent chart contained therein is the Secretary's decision and that it cancelled the previous AAAF (App. A66). Mr. Weist, an assistant to the then Assistant Secretary of HUD for Housing denied petitioner's effort to enforce Secretary Simons' decision in a garbled, irrelevant post-hoc rationalization of the agency staff explanation of its conduct over an eight year period (App. A68).

The District Court granted summary judgment dismissing Jackson Square's action for an APA Judicial review on a *sua sponte* theory never advocated by HUD. The District Court's theory was that when Congress makes a grant of power by statute to the Secretary of HUD, unless the same statute expressly states that the Secretary's subordinates are prohibited from reversing the Secretary's decision, that such subordinates, agency staff, have the power to overrule his decision.

On such basis the District Court decided that agency staff had the power to reverse the decision by the HUD Assistant Secretary waiving the original contract and granting Jackson Square $45,098 per annum, $24 per unit per month, per year, per 160 units, to correct a processing error in the original documents. The District Court approved the action of agency staff reducing the Assistant Secretary's decision from a $45,098 per annum amendment of petitioner's HAP contract to a $13,450 per annum partial correction of the processing error (App. A16).

Further, petitioner obtained an affidavit from George H. Roberts, a HUD employee who deposed that the underlying cause of the irregular Buffalo field office conduct reversing the Secretary of its agency was racial discrimination by the key staff person against the Jewish general partner of petitioner (App. A56-A60).

The District Court decided that the invidious discrimination was irrelevant upon the basis that it had found a legal basis for dismissing petitioner's causes of action (App. A24), rather than shifting the burden of proof to the respondent to demonstrate that the agency staff decision was not due to the unrefuted racial discrimination

REASONS FOR GRANTING THE WRIT

I. Petitioner Has Been Deprived Of Its Constitutional Right To Trial By Jury.

The Court of Appeals has sanctioned a departure by the Lower Court from the accepted and usual course of judicial proceedings so as to call for the exercise of this court's supervisory power.

The Court of Appeals has sanctioned a decision by the District Court which deprived petitioner of its constitutional right to a jury trial pursuant to the 7th Amendment to the U.S. Constitution by deciding the issues of fact in its decision granting HUD's Summary Judgment Motion to dismiss Jackson Square's breach of contract cause of action.

The District Court decided as a matter of law that no contract modification took place of the HAP contract which provided that modifications were agreements entered into in writing which were not inconsistent with the HAP contract (App. A33-A36).

Assistant Secretary Simons August 29, 1980 letter decision is the writing (App. A64-A65) together with the agency staff request to him (App. A61-A63) for a waiver or modification of the original contract rents. He is the officer of government authorized by statute 42 U.S.C. Sec. 1437f(c)(1) and regulation (24 CFR §880.204(B)(1)(ii)) to make the decision.

The HAP contract modification issue was a question of fact for a jury and the District Court decision violated petitioner's constitutional right to a jury trial guaranteed by the 7th Amendment to the U.S. Constitution.

Proceeding further, the District Court assumed arguendo a contract modification existed and analyzed the Secretary Simons August 29, 1980 letter and decided as a matter of law "its clear language does not support the plaintiffs' contention that it authorized a 6% increase in the rents *over and above* (Courts emphasis) the annual adjustment." (App. A36). The District Court held as a matter of law that the Secretary Simons' letter was unambiguous, and supported the fact version argued for by HUD, that the letter adjusted the contract rents as of August 29, 1980 and cancelled the previous AAAF granted petitioner six months earlier (App. A64-A65).

The Simons' letter expressly stated three times that he was requested to and he was adjusting the "original contract rents" (App. A64-A65).

Whether he was adjusting the original contract rents or whether the rent chart with approved contract rents in the Secretary Simons letter (App. A64-A65) was intended to subsume or cancel the amendment of petitioner's HAP contract by the AAAF adjustment granted six months earlier, March 13, 1980, is the ambiguity in the Simons' letter, a fact question, as to which petitioner Jackson Square has a constitutional right under the 7th Amendment of the U.S. Constitution to a jury trial.

The ambiguity is contained in the words "original contract rents" and the express reference to the field office request for a $45,098 processing error correction in the Simons' letter. The Simons' letter (App. A64-A65) and the Simons' testimony (App. A70-A72) is extrinsic evidence that was before the District Court that his August 29, 1980 letter decision and the issues raised therein had nothing to do with the AAAF previously granted petitioner (App. A72).

Further, the District Court, in its November 10, 1994 decision, after making the decision that there was no question of fact concerning the Simons' August 29, 1980 letter (App. A33-A37) and that HUD was entitled to Summary Judgment as a matter of law dismissing Jackson's breach of contract cause of action, contradicted itself in the same decision in analyzing the APA cause of action and stated "there is a factual dispute regarding the significance of the Simons' letter" (App. A45). The District Court decision conceded that the "affidavits and deposition excerpts produced by the parties offer support for both contentions and do not make clear the basis for the determination that Jackson Square would not get the requested increase" (App. A45).

The District Court decision of November 8, 1994 is intrinsically contradictory and the paragraph which makes a finding that "there is a potential dispute regarding the significance of the Simons' letter is irrefutable evidence that the petitioner has been deprived of its constitutional right to a jury trial pursuant to the 7th Amendment to the U.S. Constitution.

II. An Assistant Secretary With A Congressional Mandate Was Overruled By Agency Staff.

The Court of Appeals has approved a District Court decision which decided an important federal question in a way that conflicts with relevant decisions of this Court.

This case involves an APA Judicial review issue in which the District Court failed to enforce an Assistant Secretary's decision and his contemporaneous explanation for his decision in his deposition testimony (App. A70-A72) and to apply *Camp vs. Pitts*, 411 U.S. 138 (1973). It approved an eight years after the fact post-hoc rationalization by HUD agency staff (App. A66-A70) which refused to enforce the statute required decision by Assistant Secretary Simons which kind of post-hoc rationalization was viewed critically by *Citizens to Preserve Overton Park vs. Volpe, Secty. of Trans.*, 401 U.S. 420 (1970).

III. A Congressional Grant Of Power To The Agency Secretary May Be Overruled By Agency Staff Unless Congress Prohibits It, Said The District Court.

The Court of Appeals sanctioned District Court decision interprets an act of Congress in such a way as to violate Congressional intent.

Title 42 U.S.C. Sec. 1437f(c)(1) required the Secretary of HUD to determine that special circumstances warranted a maximum rent of 10% but not more than 20% in excess of fair market rent (App. A52-A53).

In 24 CFR Sec. 880.204 the agency specifically delegated the Secretary's power to the Assistant Secretary (App. A56-A57). (The District Court's initial decision of May 8, 1996 inadvertently referred to a later version of 24 CFR 880.204. The Court corrected the error in a May 15, 1996 amending order (App. A25-A28)).

Assistant Secretary Simons determined that special circumstances existed to correct a processing error in the original contract and to adjust the original contract rents 20% in excess of fair market rent (App. A64-A65).

The Assistant Secretary's written decision required by Statute and delegated to him by agency regulation is capable of a contemporaneous explanation as instructed by *Camp vs. Pitts*, 411 U.S. 138 (1973).

He provided a contemporaneous explanation in his deposition testimony, *i.e.* that his letter was the final agency action of his office pertaining to the material contained in his letter, (App. A70) he intended the agency staff to follow the August 29, 1980 letter that he had sent to them (App. A72) and that the issues raised in his decision had nothing to do with the annual automatic adjustment factor (App. A72).

Camp vs. Pitts, 411 U.S. 138 (1973) should be the precedent to prohibit any different determination of the informal agency adjudicatory action than expressed by Assistant Secretary Simons.

Agency staff contended that it did not have an obligation to carry out the Secretary's decision as explained by him. Agency staff alleged several alternative reasons for not doing so. It alleged it had the power to depart from Secretary Simon's determination because his decision was an interim inter-department decision (App. A13-A17). Eight years later it alleged the rent chart in the Secretary's letter was final as of the date of his letter (App. A66). Finally, Washington agency staff, Mr. Weist provided a garbled, irrelevant post-hoc rationalization unrelated to the original contract processing error correction approved by Assistant Secretary Simons (App. A68).

The District Court, however, conceived a novel theory, *sua sponte,* not previously urged by HUD, and upon such theory, made its decision.

The District Court's theory is that when an Act of Congress makes a grant of power to an agency Secretary in words of "not more than" a specific authority, but Congress does not expressly prohibit agency staff from diminishing or departing from the Secretary's decision, that there is an implied power in the agency staff to alter or reverse the Secretary's decision (App. A18-A22).

The decision of the District Court holding that a grant of power to the head of an agency must contain as well as express prohibition of power or a subordinate agency staff may reverse a Secretary's decision is in violation of the classical rule of statutory construction;

that when a person to which a statute refers is designated, there is an inference that all omissions should be regarded as exclusions, *expressio unius est exclusio alterius 2A Singer, Statutes and Statutory Construction Sec. 47.23.* Congress has a right to rely upon the *expressio unius* rule in the judicial application of a Congressional Act. The resulting decision violates the Congressional intent of Title 42 U.S.C. Sec. 1437f(c)(1).

Undaunted by the fact that it had made two previous different interpretations of how it had evaded Secretary Simon's decision, HUD promptly developed a new argument to support the District Court's novel theory, to advance the surprise result by which agency staff had achieved the result it had been seeking, to evade Secretary Simon's decision.

Chevron, U.S.A. vs. National Defense Council, 467 U.S. 837 (1984) was called out to support the theory that agency staff was authorized to depart from the Secretary's decision because the Act of Congress was silent (42 USC Section 1437f(c)(1)) that an inferior agency staff may not overrule a Secretary.

Bowen vs. Georgetown University Hospital, 488 U.S. 204 (1988) denies that the *Chevron* principle has ever been applied to agency litigation positions that are verbally unsupported by regulations, rulings or administrative practice.

The District Court decision violates the intent of Congress conferring the power upon the Secretary to determine that special circumstances exist that warrant higher maximum rent up to 20% in excess of fair market rental. 42 USC Section 1437f(c)(1).

Further, the action of the Secretary to delegate his express power to an Assistant Secretary by regulation and not to Field office agency staff is evidence of the intention of the agency at that time interpreting the Act of Congress. 24 CFR Section 880.204 (App. A56-A57).

The litigation argument of HUD using *Chevron, supra* to justify its agency staff rejection of the Assistant Secretary's decision has no merit.

IV. This Case Involves The Cancellation Of The 1980 AAAF Benefit Which Was Awarded To Jackson Square On March 13, 1980 Without A Comparability Study Of Unassisted Rents In Violation Of This Court's Decision In *Cisneros vs. Alpine Ridge Group*, 508 U.S. 10 (1993).

All the arguments that HUD makes to justify or excuse its failure to carry out the August 29, 1980 decision of Assistant Secretary Simon are based upon the predicate that HUD agency staff had the power to eliminate the 1980 AAAF benefit granted Jackson Square.

In the absence of the comparability study required by *Cisneros, supra*, the rent adjustment indicated by the AAAF remains the presumptive adjustment called for by the HAP contract to which petitioner was entitled and which the District Court decision deprived it of.

V. Petitioner's Evidence Of Racial Discrimination Placed The Burden Of Proof Of An Untainted Decision Upon HUD.

Petitioner provided unrefuted evidence from a fellow HUD employee, George H. Roberts, that the agency employee who originated the agency staff decision to diminish Secretary Simons' decision from a processing error correction of $28,800 per annum to $13,450 per annum was motivated by invidious discrimination specifically racial discrimination, because the principals of Jackson Square were Jews (App. A58-A60).

The District Court directed HUD to investigate the charge of racial discrimination but it failed to do so, reporting to the District Court that even if it existed, it was irrelevant (App. A18, A24).

The District Court decided that in view of its finding that the HUD Buffalo Office was empowered to overrule the Secretary, even assuming that the agency employee who orchestrated such action was motivated by racial bias, it was irrelevant (App. A24).

The Roberts' Affidavit (App. A58-A60) on personal knowledge is proof that racial discrimination was a motivating factor in respondent's agency decision. The substantive departure from the decision of the Assistant Secretary, the normally important decision maker and his contemporary statements are relevant. Respondent has the burden of producing evidence that the decision herein was not brought about by the racial discrimination of key agency staff, Ronald Lonca, and its failure to do so leaves the decision of the agency tainted with racial discrimination and arbitrary and capricious. *Village of Arlington Heights vs. Metro Housing Dev.*, 429 U.S. 252 (1977).

CONCLUSION

For all of the foregoing reasons, petitioner respectfully requests that this Court grant the Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Respectfully submitted,

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Attorney for Petitioner

APPENDIX

Summary Order of the United States Court of Appeals for the Second Circuit, Dated March 6, 1997.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 6 day of March, one thousand nine hundred and ninety-seven.

PRESENT:

ELLSWORTH A. VAN GRAAFEILAND,
THOMAS J. MESKILL,
JOSÉ A. CABRANES,
Circuit Judges.

UNITED STATES COURT OF APPEALS
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GEORGE LANGE III, CLERK
SECOND CIRCUIT

No. 96-6179

JACKSON SQUARE ASSOCIATES,
a New York Limited Partnership,
Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,
Buffalo Office-Region II,
Defendant-Appellee.

APPEARING FOR APPELLANT: JOHN J. PHELAN, Buffalo, New York

APPEARING FOR APPELLEE: Gail Y. Mitchell, Assistant United States Attorney, Western District of New York, Buffalo, New York (Patrick J. NeMoyer, United States Attorney, Western District of New York, John J. Cahill, Associate Field Counsel, United States Department of Housing and Urban Development, on the brief).

Appeal from the United States District Court for the Western District of New York (John T. Curtin, *Judge*).

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York and was argued.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is AFFIRMED.

Plaintiff Jackson Square Associates ("Jackson Square") appeals from the judgment of the United States District Court for the Western District of New York. The

district court granted defendant's motion for summary judgment on plaintiff's cause of action for judicial review of a United States Housing and Urban Development ("HUD") action on the ground that it was arbitrary and illegal. The district court had previously dismissed plaintiff's claim against HUD for breach of contract.

Jackson Square owns a low-income housing development in Amherst, New York. On March 13, 1979, it entered into a housing assistance payments ("HAP") contract with HUD under 42 U.S.C. §1437(f), pursuant to which HUD agreed to make rental assistance payments to Jackson Square for certain of the development's tenants. This case involved a dispute between the parties over the amount of an adjustment HUD made in the monthly rent payable to Jackson Square to account for an inaccurate estimate of the utility expenses for the housing project.

Jackson Square essentially raises two claims on appeal: (i) that the district court erred when it found that HUD's application of the rental adjustment was not arbitrary and capricious; and (ii) that the district court erred when it dismissed Jackson Square's breach of contract claim against HUD.

We affirm. We affirm the district court's judgment dismissing Jackson Square's claim that HUD's application of the rental adjustment was arbitrary and capricious for substantially the reasons stated by the district court in its order dated May 7, 1996, as amended on May 15, 1996. *See Jackson Square Associates v. United States Department of Housing and Urban Development*, 927 F. Supp. 75 (W.D.N.Y. 1996). We affirm the district court's judgment dismissing Jackson Square's breach of contract claim against HUD for substantially the reasons stated by the district court in

its order dated November 8, 1994. *See Jackson Square Associates v. United States Department of Housing and Urban Development*, 869 F. Supp. 133 (W.D.N.Y. 1994).

We have considered all of the plaintiff's claims on appeal and find them to be without merit.

Accordingly, the judgment of the District Court is hereby AFFIRMED.

s/ ELLSWORTH A. VAN GRAAFEILAND
Ellsworth A. Van Graafeiland, U.S.C.J.

s/ THOMAS J. MESKILL
Thomas J. Meskill, U.S.C.J.

s/ JOSÉ A. CABRANES
José A. Cabranes, U.S.C.J.

Judgment of The United States District Court Dismissing Plaintiff's Action As to All Claims, Dated May 10, 1996.

UNITED STATES DISTRICT COURT
_____ DISTRICT OF _____

CASE NUMBER: 88-CV-859 C

FILED
96 MAY 10 AM 9:58
U.S. DISTRICT COURT
W.D.N.Y. BUFFALO

JACKSON SQUARE ASSOCIATED, a New York Limited Partnership,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Buffalo Office-Region II,

Defendant.

JUDGMENT IN A CIVIL CASE

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[x] **Decision by court.** This action came to ~~trial~~ or hearing before the Court. The issues have been ~~tried~~ or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

The finding of this Court that the action of the HUD Buffalo office was proper, any alleged bias on the part of Lonca is irrelevant to this action.

Plaintiff's action is dismissed as to all claims.

s/ RODNEY C. EARLY
Clerk

s/ DENISE L. COLLIER
(By) Deputy Clerk

May 10, 1996
Date

Decision and Order of Honorable John T. Curtin, United States District Judge, Granting HUD Cross-Motion for Summary Judgment and Dismissing Amended Complaint, Dated May 7, 1996.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

1:88-cv-00859

Jackson Square Assoc.,

Plaintiff(s),

v.

US Dept. of Housing,

Defendant(s).

PLEASE take notice of the entry of an ORDER filed on 5/7/96, of which the within is a copy, and entered 5/10/96 upon the official docket in this case. (Document No. 99.)

Dated: Buffalo, New York
May 10, 1996

RODNEY C. EARLY, Clerk
U.S. District Court
Western District of New York
304 U.S. Courthouse
68 Court Street
Buffalo, New York 14202

Enclosure

TO:

John J. Phelan, Esq.
Gail Y. Mitchell, Esq.
Patrick H. NeMoyer, Esq.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

88-CV-859C

JACKSON SQUARE ASSOCIATES,
a New York Limited Partnership,

Plaintiff,

-vs.-

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,
Buffalo Office - Region II,

Defendant.

APPEARANCES:

JOHN J. PHELAN, ESQ., Buffalo, New York, for Plaintiff.

DENNIS C. VACCO, ESQ., United States Attorney (GAIL Y. MITCHELL, ESQ., Assistant United States Attorney, of Counsel), Buffalo, New York, for Defendant.

On November 8, 1994, the court issued a decision and order granting defendant's motion to dismiss plaintiff's first cause of action alleging a breach of contract. However, the defendant's motion for summary judgment on plaintiff's second cause of action was denied, leaving for determination the question as to whether the United States Department of Housing and Urban Development ("HUD") acted arbitrarily, with an abuse of discretion, and not in accordance with the law in determining that the plaintiff was not entitled to the full rental adjustment requested. The court held that the plaintiff's second cause of action was not barred by the statute of limitations.

After briefing, a second order was issued setting the procedures to be followed in resolving this dispute. The plaintiff argued that if the court found that the administrative record was inadequate, then it should consider affidavits or testimony in reaching a decision as to whether or not the action of the agency was arbitrary. The defendant, however, argued that the court should only look at the record to review the agency's final decision.

After considering the arguments, the court determined that the matter should be returned to the agency to supplement the record if necessary, and to determine whether racial bias played any role in the decision.

The agency has now completed the record by filing the declaration of Kenneth LoBene of the Department of Housing (Item 83). Mr. LoBene's declaration reviews the documents which have been filed in the record and presents an explanation of how the record reached its conclusions. The issues remaining before the court are whether HUD acted correctly in not approving the full rent increase requested by the plaintiff, and whether HUD's decision was tainted by bias on the part of Ronald Lonca, the HUD employee responsible for supervising the Jackson Square project.

The parties have filed briefs, and oral argument was held with the court on April 26, 1996. The following constitutes the court's findings of fact and conclusions of law.

BACKGROUND

Jackson Square owns a 160-unit low-income housing development in the Town of Amherst, New York. Effective March 13, 1979, it entered into a HAP contract

with HUD pursuant to 42 U.S.C. §1437(f), under which HUD agreed to make rental assistance payments to Jackson Square for the development's eligible tenants. Item 83, Ex. A. Under the terms of the HAP contract HUD established unit rents as follows:

40 one-bedroom units	—	$307 per month
60 two-bedroom units	—	$341 per month
50 three-bedroom units	—	$390 per month
10 four-bedroom units	—	$427 per month

These rents were established based on a review of project income and costs.

At the time HUD processed this project for mortgage insurance under Section 221(d)(4) of the National Housing Act in 1977, HUD estimated that the utility expense for common areas of the project would be approximately $69,000 per year. Item 83, ¶8. The plaintiff objected to this estimate, and certified to HUD that operating costs for lighting and miscellaneous power in the common areas (not individual apartments) would be $19,200. *Id.* HUD adopted plaintiff's estimate in its mortgage processing since it was allegedly based on an engineering study. *Id.*

In June 1980, after plaintiff had commenced performance of the project, plaintiff advised HUD that its estimate of the utility expenses had been grossly understated. Item 83, ¶9. The actual charge for common-area utilities was $64,297.74. In order to compensate for this shortfall, the plaintiff requested that HUD process a rent increase for the project. *Id.* In support of this application, plaintiff submitted the actual utility bills for the project over the previous twelve months.

HUD's engineering staff reviewed the information submitted by the plaintiff and determined that $64,000 would be a reasonable utility expense. Item 44. The staff concluded that a budget adjustment of $45,098 would be needed for billing year 1980.

In order to allow plaintiff to carry this increased cost, James Anderson of the Buffalo Area Office of HUD wrote a memo to Conrad Egan, Acting Director, Office of Multifamily Housing Management and Occupancy. Item 83. Ex. E. In the memo, dated July 17, 1990, Anderson provided "an analysis of the needs of the project."

To illustrate the increases the project would require, Anderson included a detailed table in the memo outlining the new rent levels and utility increases his office proposed. For example, for a one-bedroom apartment which rented for $307 per month under the original HAP contract, Anderson proposed two adjustments. The memo first proposes a common area utilities adjustment of $24 per month, bringing the proposed new adjusted contract rent to $331 per month, an increase of 7.8 percent. The memo then proposes a revised tenant's utility allowance of $32 per month, bringing the market rent that Anderson estimated would be required to keep the project solvent at $353 per month, an overall increase of approximately 15 percent.[1]

It is important to note that Anderson's calculation does not include the Automatic Annual Adjustment Fact (AAAF). The HAP contract provides that on each anniversary date of the contract, the contract rents shall be adjusted by applying the AAAF most recently published by the government in the Federal Register.

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[1] The memo calculates the market rent needed as $363, but this seems to be a simple error in addition.

The anniversary date for the Jackson Square project's first year of operation was March 13, 1980, three months prior to the Anderson memo, at which point plaintiff was presumptively entitled to raise the rents by 4.8 percent, pursuant to the latest published AAAF. Item 96, p.2. Therefore, plaintiff's base rent at the time of the memo should have been approximately $322 ($307 x 1.048 = $322) on that date, and any utility adjustments should have presumably incorporated the adjusted rent.[1]

The anniversary date of the Jackson Square project, on which it was presumptively entitled to the 4.8 percent AAAF, was March 13, 1980. It is unclear whether Anderson understood that the project had recently received its AAAF increase, and if he did, why he didn't change his estimates to include it.

In a memo dated August 29, 1980, HUD Assistant Secretary Lawrence Simons adopted Anderson's proposal and approved the following rent increase schedule:

	Original Contract Rent	*Original Fair Market Rent*	*120% FMR*	*Adjusted Contract Rent*	*Approved Contract Rent*
1BR	$307	$317	$380	$331	$331
2BR	$341	$366	$439	$365	$365
3BR	$390	$414	$497	$414	$414
4BR	$427	$457	$548	$451	$451

Item 83, Ex. F.

The above increase of $24 per unit per month was obviously intended by the Assistant Secretary to simply spread an additional $45,000 per year evenly over

[1] In a memo dated February 19, 1980, Boyd O. Barton, Director, Housing Division, HUD Buffalo Area Office, informed plaintiff that it would receive the 4.8 percent increase effective March 13, 1980. Item 43. In its decision dated November 8, 1994, this court incorrectly stated that this increase was intended to make up the utility shortfall. *Id.* p.2. In fact, this increase was the automatic adjustment factor provided for in the contract.

Jackson Square's 160 units (24 x 160 = 46,080). As set out more fully below, the calculation of original fair market rent, and 120 percent of fair market rent, are required by statute, as HUD cannot provide rent payment assistance for units priced more than 20 percent over fair market rent.

The Secretary also stated:

> Additionally, the approved contract rent may contain the following utility allowance: 1BR - $34; 2BR - $42; 3BR - $53; 4BR - $64. These rents and utility allowance are based on the original processing error and the need documented in your memorandum.

From the rather simple calculation proposed by Anderson and approved by the Assistant Secretary, however, the situation was complicated somewhat by the HUD Buffalo Area Office.

In a memo dated October 1, 1980, from Boyd O. Barton, Director, Housing Division, Buffalo Area Office, to plaintiff, Barton sets out what the memo characterizes as the final approved rent adjustment. Item 83, Ex. G. The adjustment granted plaintiff the $24 increase approved by the Assistant Secretary, but included in the increase the 4.8 percent automatic annual adjustment factor to which plaintiff was entitled pursuant to the HAP. This resulted in the following modified schedule:

Original K Rent		*AAAF (4.8%)*		*New K Rate*	*Approved Rent*
1BR $307	x	1.048	=	$322	$331
2BR $341	x	1.048	=	$357	$365
3BR $390	x	1.048	=	$409	$414
4BR $427	x	1.048	=	$448	$451

This modification of the Assistant Secretary's approved increase forms the core of the present action. Barton's memo makes no mention of the simple $24 adjustment approved by Simon, nor does it offer any explanation for departing from Anderson's calculation, which did not include the AAAF in the proposed increase. Plaintiff asserts that it was entitled to a $24 increase above the AAAF-adjusted rents, and that subtracting the AAAF from the $24 led to an annual shortfall of $31,550 from the $45,000 annual adjustment which was the stated goal of HUD officers.

It is not clear why Barton didn't simply call plaintiff's attention to Paragraph 1.8c of the HAP contract entered into by the parties, which provides:

> Special Additional Adjustments. Special additional adjustments shall be granted, when approved by the Government, to reflect increases in the actual and necessary expenses of owning and maintaining the Contract Units which have resulted from substantial general increases in real property taxes, utility rates, or similar costs (i.e., assessments, and utilities not covered by regulated rates), *but only if and to the extent that the Owner clearly demonstrates that such general increases have caused increases in the Owner's operating costs which are not adequately compensated for by automatic annual adjustments.* The Owner shall submit to the Government financial statements which clearly support the increase.

Item 83, Ex. C (emphasis added).

The affidavit of Kenneth LoBene, current Director of the Multifamily Housing Division of the Buffalo Office, acknowledges that the Buffalo office failed to communicate two facts which might have greatly simplified matters: that the AAAF had been recently

granted, and that paragraph 1.8c of the HAP contract requires that the AAAF be subtracted from any special adjustment. Specifically, LoBene stated:

> It is clear that the rent determination made by HUD's Buffalo Office in this case was based on the language in the HAP contract and Section 8 statute and regulations which provides that special adjustments are only granted to the extent that AAAFs do not adequately compensate the project owner for increased costs. Perhaps the Buffalo Office's memorandum to Conrad Egan should have recited that an AAAF was recently granted to the project. That may have eliminated the basis for plaintiff's claim that the Buffalo Office failed to implement the rent increase approved by the Assistant Secretary.

Item 83, ¶15 (footnote and citations omitted).

The rents utlimately approved by HUD in its October 1, 1980, memo represent the following increases over the AAAF-adjusted rents:

1BR - $9 above the AAAF-adjusted rent x 40 units	=	$ 360/month
2BR - $8 above the AAAF-adjusted rent x 60 units	=	$ 480/month
3BR - $5 above the AAAF-adjusted rent x 50 units	=	$ 250/month
4BR - $3 above the AAAF-adjusted rent x 10 units	=	$ 30/month
Total per month increase over AAAF-adjusted rent	=	$ 1,120/month
Total annual increase over AAAF-adjusted rent	=	$13,450

The complexity of this already complicated problem is compounded by mathematical inconsistencies in the amended complaint. Item 31. In its complaint, plaintiff correctly asserts that Assistant Secretary Simons, in his August 29, 1980 memo, approved a contract rent increase of $24 per unit per month for 160 units, amounting to a total annual payment $46,080. *Id.* ¶8. Plaintiff then, however, states that defendant has paid it $17,280.00 per annum since the final HUD

determination. *Id.* ¶12. This number is apparently based on a calculation of the $9 increase for a one-bedroom unit multiplied by 160 units multiplied by 12 months (9 x 160 x 12 = 17,280). But if HUD adhered to the schedule set out in its October 1, 1980 memo, it has paid plaintiff only $13,450 per year, as outlined above. If HUD has actually paid plaintiff the $17,280 claimed in the amended complaint, then HUD payments have somehow departed from the above schedule.

In a letter dated October 21, 1980, Jeannette Levin, management agent for the Jackson Square project, wrote a letter to Barton complaining about the 1.2 percent raise (over the AAAF adjustment), Jackson Square had received, instead of the 6 percent increase (over the AAAF adjustment) plaintiff had expected. Item 83, Ex. H. In this letter, Ms. Levin suggests that the reason for the low increase was some unspecified bias on the part of Messrs. Meyer and Lonca, then employed in the Buffalo office of HUD.

Barton answered Ms. Levin's complaint in a letter dated November 5, 1980. Item I. Barton stated:

> On March 13, 1980, your contract rents were adjusted 4.8%, the annual adjustment factor. You indicated you needed an additional increase to compensate for increased utility costs due to increased consumption. The documentation for this increase was reviewed and it was determined that an additional $45,000 was required. This was recommended to our Washington Office and they approved an additional 2.8% increase to compensate for the increased utility consumption. The combination of these two increases represents a 7.6% increase in the unit rent but require only a 6% increase in the Housing Assistance Payment Contract.

Item 83, Ex. I. Barton offered no explanation of the confusing final sentence of this paragraph. In fact, plaintiff did get an approximate 7.6 percent overall increase over the original contract rent ($307 x 1.076 = $330.33). But the Washington office did not specifically approve a 2.8 percent increase. The Assistant Secretary approved a $24 per unit increase to generate $45,000 in revenue, not including the AAAF. The 2.8 percent figure is the increase from the AAAF-adjusted rent of $322 to the approved rent of $331 for a one-bedroom apartment, that was implemented by the local office. It is worth noting that in fact, the percentage increases for larger apartments were significantly smaller than 2.8 percent.

Even more confusing is Barton's repeated failure to bring paragraph 1.8c of the HAP contract to plaintiff's attention.

Following HUD's unsatisfying response, plaintiff began a correspondence with various HUD officials that would last for the next eight years. In February 1988, then-counsel for plaintiff advised HUD that it had obtained a 1980 HUD memo, through a Freedom of Information Act request, which discussed proposed rent increases. Plaintiff observed correctly that if the increase approved in Assistant Secretary Simons' memo had been granted, the increase would have been $24.00 per unit, instead of the $7 actually granted. Item 44. The $7 increase referred to represents the average per unit per month increase across all units.

HUD answered that it saw no inconsistencies in the record, that the approved increases granted plaintiff were valid, and that in any event it had no obligation to "provide for" the increases. Item 83, Ex. N.

In an order dated November 8, 1994, this court granted partial summary judgment to HUD, stating that "[t]he sole question to be determined in this lawsuit is whether HUD acted arbitrarily, capriciously, with abuse of discretion, or not in accordance with the law in determining that [plaintiff] Jackson Square was not entitled to the full rental adjustment requested." Item 71, p. 24.

In an order dated January 24, 1995, the court also ordered the case remanded to HUD to more fully explain to the court what procedure was followed in making its decision and what materials were considered. The court also ordered the agency to conduct an investigation into whether the decisionmaking process was tainted by bias on the part of Ronald Lonca, who was the HUD employee responsible for the supervision of the Jackson Square project. Item 79, p. 4.

Plaintiff now moves for summary judgment, arguing that Secretary Simons' memo represented the final determination of the agency, and that the Buffalo Office was bound by the Secretary's decision. Item 85.

Defendant cross-moves for summary judgment arguing that the statutory authority requires only that HUD make a rational decision, and that the decision of the Buffalo Office was not only rational, but was required by paragraph 1.8c of the HAP contract. Item 91.

DISCUSSION

I. Secretary Simons' memo was not the final determination of the agency.

42 U.S.C. §1437f(c)(1) provides that the maximum monthly rent for which government assistance payments will be paid cannot exceed by more than 10 percent the

fair market rent approved by the Secretary, except that the rent may exceed the fair market rent by more than 10 percent, but not more thant 20 percent, where the Secretary determines that "special circumstances" warrant the higher rent.

24 C.F.R. §880.204 provides:

> (b)(1) Limitation on contract rents. The contract rents for a project through cost certification at completion must be within both of the following limitations:
>
> (1) Fair market rent. The contract rent plus any utility allowance for the unit must not exceed the Fair Market Rent in effect at the time of processing. The published Fair Market Rents will reflect a trended rent in order to allow for the period of construction as stated in the publication . . . The contract rent plus utility allowance may exceed the applicable Fair Market Rent under special circumstances or if needed to implement a local Housing Assistance Plan:
>
> (A) By up to 10 percent with the approval of the HUD field office manager, or (B) Except in the case of the rental of a manufactured home space only, by up to 20 percent with the approval of the Regional Administrator.

Plaintiff argues that these statutes read together require that maximum rents must be set by the Assistant Secretary of HUD for Housing. Item 85, p.3. According to plaintiff, the Buffalo Office had no authority to depart from the rents set by Assistant Secretary Simons, because his determination was the final decision of the agency. Plaintiff further argues that "[i]t is conceded that the HUD decision requested in the Anderson memorandum to the Washington office could only be made by the Asst. Secretary for Housing." *Id.* citing Item 83, Ex. E.

In examining plaintiff's argument, the court first points out that defendant never conceded that the decision as to maximum rents could only be made by the Assistant Secretary. Instead, officers of the HUD Buffalo Office stated that to approve a maximum rent that exceeded fair market rents by more than 10 percent, they would need the approval of "Washington," presumably meaning the Assistant Secretary. It is important to note that the defendant's position is that while the Assistant Secretary had to approve the rent increase, the Buffalo Office had discretion to set rent levels under the approved maximum. Item 91, p.12. HUD has never conceded that the local office was required to grant the maximum level approved by the Assistant Secretary.

Furthermore, the court finds no support in the relevant statutes, quoted above, for a requirement that only the Assistant Secretary could make the decision in question. Instead, the statutes quoted above require only that rent increases above ten percent be approved by a "regional administrator."

Plaintiff then argues that the Supreme Court has held that "the Secretary's decision is a final informal agency adjudication." Item 96, p.2. In support of this proposition, plaintiff first cites a series of cases it refers to lyrically as the *Morgan* Quartet. In *Morgan v. United States*, 298 U.S. 468 (1936) (hereinafter *Morgan I*), the Court held that in a quasi-judicial proceeding requiring the taking of evidence, determinations of findings, and orders supporting such findings, the hearing officer must be the one who makes the ultimate decision. The matter may not be delegated to one who had not heard the evidence. *Morgan I*, 298 U.S. at 480-81. The Court noted that the type of proceeding it contemplated was "not one

of ordinary administration, conformable to the standards governing duties of a purely executive character. It is a proceeding looking to legislative action. . . ." *Id.* at 479. This court finds that the process of rate-setting at issue in the present case is exactly the type the *Morgan I* Court intended to exclude from its analysis. The determination of maximum rent levels is a duty of "ordinary administration." Pursuant to the statute, HUD officers have the authority to establish fair market rents, and to set rent increases up to 120 percent of those rents in cases of need. The section of the statute authorizing the rent-setting calls for no formal process, and instead calls for a "purely executive" type of decisionmaking.

Plaintiff then cites the decision of the Second Circuit in *KFC Management Corp. v. NLRB,* 497 F.2d 298 (2d Cir. 1974), *cert. denied,* 423 U.S. 1087 (1976), for the same proposition. The *KFC* court followed the *Morgan* analysis, and held that where the relevant statute made it clear that a decision was to be made by the National Labor Relations Board, the members of the Board could not delegate the decision to their staff members. *Id.* at 302.

The main distinction between the *KFC* holding and the present case is the clarity of the statutory language. As stated, there is nothing in either of the statutes quoted above requiring that the Assistant Secretary make any decision, other than to approve proposed increases over 110 percent of fair market rents.

Absent such clear language requiring that a decision be made by a particular person, the Second Circuit has clearly stated that "'an agency's construction of its own regulations is entitled to substantial deference.' Or, the

mere existence of 'more equitable' alternatives 'does not render the Secretary's choice invalid.'" *State of New York v. Lyng*, 829 F.2d 346, 349-50 (2d Cir. 1987).

Moreover, the language of the Assistant Secretary himself seems to contemplate that his approval was just one interim part of the HUD decisionmaking process. In his August 29 memo, Assistant Secretary Simons approved a contract rent increase of $331. He then stated, "[a]dditionally, the approved contract rent *may* contain the following utility allowance. . . ." Item 83, Ex. F (emphasis added). This language suggests strongly that the Buffalo Office had the authority to adjust rents within the maximum levels approved by the Assistant Secretary.

Consequently, this court concludes that the decision of the Buffalo Area Office was the final HUD determination, and that the Buffalo Area Office had the authority to depart from the approved maximum levels outlined in the Assistant Secretary's memo of August 29, 1980, provided its determination was not arbitrary and capricious.

II. The decision of the Buffalo Area Office was neither arbitrary nor capricious.

Defendant argues that the determination of the Buffalo Office was based on the plain language of paragraph 1.8c of the HAP contract, which provides that special adjustments are only provided to the extent that the AAAF's do not adequately compensate the project owner for increased costs. Defendant argues that its decision to include the AAAF in the proposed increase was rational. Item 91, p.12.

Plaintiff counters that the "conduct of agency staff of subtracting the AAAF from the Jackson Square approved contract rent cancelled out the statutory AAAF of 1.048 that plaintiff had received on March 13, 1980." Item 96, p.3.

In support of its main argument, plaintiff argues that the AAAF benefit is a presumptive right to which a property owner is entitled as a party to a HAP contract, unless HUD has carried out a compatibility study which established that the adjusted rate exceeded comparable unassisted rents. Plaintiff cites *Cisneros v. Alpine Ridge Group*, ____ U.S. ____, 113 S.Ct. 1898 (1993) in support of this proposition.

This court notes as an initial matter that the *Cisneros* decision does not hold that the AAAF payment is a presumptive right. Instead, the Court noted that AAAFs remain the "presumptive adjustment" called for under the HAP contract. *Id.* at 1904.

However, even assuming the *Cisneros* decision could be construed as plaintiff maintains, there is nothing in that construction inconsistent with paragraph 1.8c of the HAP contract. Paragraph 1.8c simply states that the AAAF must be calculated into any requested special additional adjustments. This requirement is in no way inconsistent with the proposition that the AAAF is a presumptive right.

This court therefore concludes that the decision of the Buffalo Office, although it could have been far more plainly explained to plaintiff, was a reasonable decision within the statutory discretion granted the agency.

III. Allegations of bias on the part of HUD staff member Ronald Lonca.

Plaintiff offers the deposition of George Roberts, formerly a loan specialist in the HUD Buffalo Office, as evidence that Ronald Lonca, the HUD officer in charge of the Jackson Square project, harbored a bias against Frank Levin, president of Jackson Square, because Levin was Jewish, and that Lonca deducted the AAAF from the rent adjustment because of that bias. Item 96, p.9; Item 96 Ex. 5.

Given the finding of this court that the action of the HUD Buffalo office was proper, any alleged bias on the part of Lonca is irrelevant to this action. Even assuming, *arguendo,* that Lonca was biased against the plaintiff, and deducted the AAAF from the rent adjustment due to that bias, the AAAF deduction was not only proper, but was required by paragraph 1.8c of the HAP contract. The court does not, therefore, see how plaintiff could show that he was in any way injured by Lonca's alleged bias.

CONCLUSION

For the above reasons, plaintiff's motion for summary judgment is denied and defendant's cross-motion for summary judgment is granted. Plaintiff's action is dismissed as to all claims.

So ordered.

s/ JOHN T. CURTIN
John T. Curtin
United States District Judge

Dated: May 7, 1996

Order of Honorable John T. Curtin, United States District Judge, Dated May 15, 1996 Amending Decision and Order Dated May 7, 1996.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ORIGINAL
RECEIVED AND FILED
UNITED STATES DISTRICT COURT CLERK
WESTERN DISTRICT OF NEW YORK
MAY 15, 1996
BY: RCE

88-CV-859C

JACKSON SQUARE ASSOCIATES,
a New York Limited Partnership,

Plaintiff,

-vs-

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,
Buffalo Office - Region II,

Defendant.

The court's final order in this case dated May 7, 1996, beginning at p. 11, ¶3, should be amended as follows (redlined language to be deleted, and underlined, italicized language to be added):

DISCUSSION

I. Secretary Simons' memo was not the final determination of the agency.

42 U.S.C. §1437f(c)(1) provides that the maximum monthly rent for which government assistance payments will be paid cannot exceed by more than 10 percent the fair market rent approved by the Secretary, except that the rent may exceed the fair market rent by more than 10 percent, but not more than 20 percent, where the Secretary determines that "special circumstances" warrant the higher rent.

24 C.F.R. §880.204 provides, *as worded in 1980, provided*:

> (b)(1) Limitation on contract rents. The contract rents for a project through cost certification at completion must be within both of the following limitations:
>
> (I)*(1)* Fair market rent. The contract rent plus any utility allowance for the unit must not exceed the Fair Market Rent in effect at the time of processing. The published Fair Market Rents will reflect a trended rent in order to allow for the period of construction as stated in the publication . . . The contract rent plus utility allowance may exceed the applicable Fair Market Rent under special circumstances or if needed to implement a local Housing Assistance Plan:
>
> (A)*(i)* By up to 10 percent with the approval of the HUD field office manager, or
>
> (B)*(ii)* Except in the case of the rental of a manufactured home space only, By up to 20 percent with the approval of the Regional Administrator *HUD Assistant Secretary for Housing* . . . .

Plaintiff argues that these statutes read together require that maximum rents must be set by the Assistant Secretary of HUD for Housing. Item 85, p.3. According to plaintiff, the Buffalo Office had no authority to depart from the rents set by Assistant Secretary Simons, because his determination was the final decision of the agency. Plaintiff further argues that "[i]t is conceded that the HUD decision requested in the Anderson memorandum to the Washington office could only be made by the Asst. Secretary for Housing." *Id.* citing Item 83, Ex. E.

In examining plaintiff's argument, the court first points out that defendant never conceded that the decision as to maximum rents could only be made by the Assistant Secretary. Instead, officers of the HUD Buffalo Office stated that to approve a maximum rent that exceeded fair market rents by more than 10 percent, they would need the approval of "Washington," presumably meaning the Assistant Secretary. It is important to note that the defendant's position is that while the Assistant Secretary had to approve the rent increase, the Buffalo Office had discretion to set rent levels under the approved maximum. Item 91, p.12. HUD has never conceded that the local office was required to grant the maximum level approved by the Assistant Secretary.

Furthermore, the court finds no support in the relevant statutes, quoted above, for a requirement that only the Assistant Secretary could make the decision in question. Instead, the statutes quoted above require only that rent increases above 10 percent be approved by a "regional administrator," *the Assistant Secretary for Housing. Nothing in the statute prohibits regional officers from departing from the maximum approved levels.*

So ordered.

s/ JOHN T. CURTIN
John T. Curtin
United States District Judge

Dated: May 15, 1996

Decision and Order of Honorable John T. Curtin, United States District Judge, Granting Defendant's Motion to Dismiss Contract Cause of Action and Denying Motion to Dismiss Causes of Action for 5 USC 706(2)(A) Review, Dated November 8, 1994.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

RECEIVED
11-14-94 RCE
BY MAIL

1:88-cv-00859

Jackson Square Assoc.,

Plaintiff(s),

v.

US Dept. of Housing,

Defendant(s).

PLEASE take notice of the entry of an ORDER filed on 11/8/94, of which the within is a copy, and entered 11/10/94 upon the official docket in this case. (Document No. 71.)

Dated: Buffalo, New York
November 10, 1994

RODNEY C. EARLY, Clerk
U.S. District Court
Western District of New York
304 U.S. Courthouse
68 Court Street
Buffalo, New York 14202

Enclosure
TO:
John J. Phelan, Esq.
Donald P. Simet, Esq.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

88-CV-859C

JACKSON SQUARE ASSOCIATES,
a New York Limited Partnership,

Plaintiff,

-vs.-

UNITED STATES DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT,
Buffalo Office - Region II,

Defendant.

APPEARANCES:

JOHN J. PHELAN, ESQ., Buffalo, New York, for Plaintiff.

PATRICK H. NEMOYER, ESQ., United States Attorney (DONALD P. SIMET, ESQ., Assistant United States Attorney, of Counsel), Buffalo, New York, for Defendant.

BACKGROUND

This is an action by plaintiff Jackson Square Associates ("Jackson Square") against defendant United States Department of Housing and Urban Development ("HUD") over the amount of payments due under a Housing Assistance Payments ("HAP") contract entered into by the parties in 1979. Plaintiff brought suit for breach of contract and to enforce payments granted by defendant to Jackson Square in a final agency action on August 29, 1980.[1] Defendant seeks summary judgment

[1] In a previous order, the defendant's motion to dismiss for lack of subject matter jurisdiction was denied, and plaintiff was permitted to amend its complaint. *Jackson Square v. U.S. Dept. of HUD*, 797 F. Supp. 242 (W.D.N.Y. 1992).

to dismiss the action on four separate grounds. HUD claims that: (1) the plaintiff failed to establish the contract alleged in the amended complaint's first cause of action; (2) this court lacks jurisdiction over the second cause of action under the Administrative Procedure Act, 5 U.S.C. §701 (1977) because HUD's decision to increase rents covered by HAP contracts are committed to agency discretion by law and because an adequate remedy at law exists; (3) plaintiff has failed to show that HUD's administrative action was arbitrary, capricious, or otherwise not in accordance with law; and (4) this action is barred by the statute of limitations.

FACTS

Jackson Square owns a 160-unit low-income housing development in the Town of Amherst, New York. Effective March 13, 1979, it entered into a HAP contract with HUD, pursuant to 42 U.S.C. §1437(f), under which HUD agreed to make rental assistance payments to Jackson Square for the development's eligible tenants. After Jackson Square commenced performance of the contract, it discovered that the cost of providing hot water to the tenants and the heating of the common areas of the project had been grossly underestimated.

Plaintiff notified HUD of the error; and on February 18, 1980, Boyd Barton of the HUD Buffalo area office replied that the rental assistance payments would be increased by a factor of 1.048 effective March 13, 1980, to make up the shortfall. Item 43. On July 17, 1980, HUD's Buffalo Office wrote its headquarters to ask for authority to increase the HAP contract by $45,098, or 6 percent, to correct the processing error which led to inadequate coverage of utility costs. Item 46. However, the rents listed in the request document did not include the 4.8 percent annual adjustment for 1980. Item 39, ¶1.

Assistant Secretary Lawrence B. Simons wrote to Buffalo Area Office Manager James F. Anderson ("Simons letter") on August 29, 1980, approving the suggested 6 percent rent increases. Item 47. In a letter dated October 1, 1980, the Buffalo office informed Jackson Square that a rent adjustment had been approved, amounting to a 6 percent overall increase, or 1.2 percent above the annual adjustment. Item 48.

On October 21, 1980, Jackson Square responded with "shock and dismay" that the approved increases "reflected a 1.2% raise, not the 6% expected . . . ." Item 55. Frank Levin from Jackson Square met with Edward Izsak of the Buffalo HUD office on December 3, 1980, and was shown for the first time the correspondence between Simons and Anderson. From the meeting and the letters, Levin surmised that Jackson Square's rents were increased by a total of 6 percent in 1980, but that this 6 percent included an annual adjustment factor of 4.8 percent. Levin wrote to Izsak on December 11, 1980, and asked that the new approved contract rents reflect separate adjustments for the annual 4.8 percent and the 6 percent to cover the mistake in utility cost estimates. Item 57.

Thereafter, Jackson Square and HUD held several meetings and engaged in correspondence discussing further modification of the HAP contract. On July 25, 1983, HUD informed Jackson Square that plaintiff's claim was being denied after HUD had "reviewed our processing of the rental adjustment . . . and found that is [sic] was consistent with Secretary Simon's memo of August 29, 1980." Item 40, Ex. 3. Plaintiff apparently made no further efforts to press its claim until 1988 when, after receipt of some HUD documents under the Freedom of Information Act, it submitted the dispute to

HUD's Buffalo office. The Buffalo office denied Jackson Square's claim on March 21, 1988. Plaintiff appealed this decision to the Secretary of HUD, who denied it on May 13, 1988.

Plaintiff claims that its HAP contract was modified by the Simons letter and sues for breach of contract for HUD's failure to follow the modification with increased payments of $45,098 per annum. Since HUD only pays an additional $9 per unit or $17,280 over and above the original contract rent subsidies, plaintiff is faced with an annual shortfall of $15 per unit or $28,800 in utility bills. Item 31 at ¶¶10-12, 21. In its second cause of action, plaintiff claims that the Simons letter represented HUD's final agency decision and seeks enforcement of that decision. Jackson Square requests damages of the past annual shortfall plus $28,800 per annum for the balance of the 20-year HAP contract, together with interest and costs. *Id.* at ¶14.

DISCUSSION

I. Breach of Contract

Plaintiff's first cause of action is for breach of contract. Jackson Square alleges that HUD agreed to a modification of the parties' 1979 HAP contract to address the shortfall created by the error in the estimation of utility costs, as evidence by Simons' letter. According to the plaintiff, HUD breached this agreement by paying a 1.2 percent increase rather than the 6 percent promised in the alleged contract modification. Items 40 at ¶3; 42 at 2.

Defendant urges the court to find that, as a matter of law, no modification of the contract occurred and thus, there was no breach. "Where 'a question of intention is

determinable by written agreements, the question is one of the law, appropriately decided . . . on a motion for summary judgment.' " *Arcadian Phosphates, Inc. v. Arcadian Corp.*, 884 F.2d 69, 73 (2d Cir. 1989), quoting *Mallad Construction Corp. v. County Fed. Sav. & Loan Ass'n*, 32 N.Y.2d 285, 291, 298 (1973).

To establish a contract with the Government, a party must demonstrate: (1) mutual intent to contract, including a communicated offer, acceptance and consideration; (2) lack of ambiguity in the offer and acceptance; and (3) actual authority on the part of the Government agent. *Solar Turbines v. United States*, 23 Cl. Ct. 142, 150 (Cl. Ct. 1991). A valid contract modification must meet the same standard. *Id.* According to defendants, Jackson Square never agreed to the rent level actually aproved by HUD, and HUD never accepted the higher rent levels Jackson Square asserts in its complaint. Thus, the contract was not modified by the amount alleged in the first cause of action.

The defendant points out that Simons' letter to Anderson was an internal memorandum, not addressed or initially sent to plaintiff. Further, the letter does not specifically say that the contract will be modified. It merely approves the increases suggested by the Buffalo office pursuant to HUD regulations. The defendant also asserts than even if this constituted an offer to modify the contract, it was not accepted by Jackson Square. On the contrary, the plaintiff reacted with "shock and dismay" that the approved increase was significantly less than anticipated.

Lastly, defendant argues that the HAP contract clearly states that all amendments to the contract must be in writing. Plaintiff has shown no such writing other

than the Simons letter, which was merely an internal memo. Since plaintiff has failed to show a communicated offer, acceptance, and consideration, the court must find that the alleged modification of the contract never occurred and thus could not have been breached.

Jackson Square responds that 24 CFR §880.204(b)(1)(i)(B) (1990) provides that the approval of an increase in rents to correct a processing error must be made by the Assistant Secretary. At deposition, Simons testified that determination contained in his letter of August 29, 1980, was a final agency action. Item 60 at 20. Thus, even though the letter was not provided to the plaintiff until December, Jackson Square maintains that it constituted a modification of the contract.

The evidence on the record is insufficient to conclude that the Simons letter constituted a modification of the contract. The HAP contract unambigously states at ¶1.1g that:

> This Contract, including . . . exhibits, comprises the entire agreement between the parties hereto with respect to the matter contained herein, and neither party is bound by any representations or agreements of any kind except as contained herein or except agreements entered into in writing which are not inconsistent with this Contract.

Item 31, Ex. 1. The letter is in writing and approves an adjustment of the rents in the original contract, but it is unclear whether these adjustments were ever formally offered or accepted. Simons did not address or send the letter to the plaintiff. Jackson Square reacted with "shock and dismay" when informed by the Buffalo office of the amount of the increase. Nevertheless, the terms of the letter were put into effect. HUD commenced paying Jackson Square the overall 6 percent rent increase which

Simons approved, and the plaintiff presumably accepted the added payment without conceding that it was accurate.

In order to withstand summary judgment on its breach of contract claim, however, Jackson Square must demonstrate a factual dispute on the more important question of whether the Simons letter actually approved the level of increase claimed by the plaintiff. Even assuming arguendo that the letter represented a bona fide modification, its clear language does not support the plaintiff's contention that it authorized a 6 percent increase in the rents *over and above* the annual adjustment. The letter states that the adjusted contract rents which would be approved were:

$331	1BR	+	$34 utility allowance
365	2BR	+	42
414	3BR	+	53
451	4BR	+	64

These figures accurately represented the increases in rents received by Jackson Square. Therefore, even though the plaintiff has shown a genuine issue concerning the effect of the Simons letter on the contract, the content of the letter itself is unambiguous. In plain language and figures, it sets out the amount of the increase in rent which the *defendant* maintains is correct.

"Interpretation of a written agreement becomes a factual inquiry into the parties' intention only when the language of that agreement is ambiguous as a matter of law. Where the parties' intention is clear from 'the four corners of the instrument,' no ambiguity exists requiring a factual inquiry into intention, and interpretation is a matter of law." *Pharmaceutical Society of the State of New York, Inc. v. Cuomo*, 856 F.2d 497, 501 (2d Cir.

1988) (citations omitted). The clear terms of the Simons letter and the contract clause which mandates written modification preclude the court from examining parol evidence regarding the intent of the parties. Since the increases which the Simons letter approved in unambiguous terms were actually paid to Jackson Square by the defendant, the plaintiff has failed to state a cause of action for breach of contract. The first cause of action of Jackson Square's complaint must be dismissed.

II. Jurisdiction under the APA

A. Agency Discretion

HUD next argues that this court has no jurisdiction to enforce the increased payment alleged by plaintiff to be the agency's final determination because the Secretary's decision to increase rents is discretionary. The Administrative Procedure Act ("APA") provides for judicial review of final agency action except where precluded by statute or where "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a) (1977). HUD cites well-established authority that the decision to increase rents is discretionary for the agency and therefore not reviewable. *Reiner v. West Village Associates,* 768 F.2d 31 (2d Cir. 1985); *Grace Towers Tenants Ass'n v. Grace Housing Dev. Fund Co., Inc.,* 538 F.2d 491 (2d Cir. 1976).

Plaintiff responds that the cases cited by HUD are all attempts by third-party tenants to protest rent increases. Here, the plaintiff is a party to the contract. Plaintiff argues that the court has jurisdiction absent "clear and convincing evidence of a legislative intent to restrict access to judicial review . . . ." *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 410

(1971). The Supreme Court has found only a very narrow restriction on judicial review of actions " 'committed to agency discretion.' ... The legislative history of the APA indicates that it is applicable in those rare instances where statute are drawn in such broad terms that in a given case there is no law to apply." 401 U.S. at 410 (citation omitted). This court has previously determined that 42 U.S.C. §1404a provides a waiver of sovereign immunity permitting Jackson Square to sue HUD for its action on the HAP contract. Item 30. Plaintiff asserts that disputes over 42 U.S.C. §1437f regulatory contracts between a project sponsor and HUD are subject to judicial review as broadly as any commercial contract. *F.H.A. v. Burr*, 309 U.S. 242 (1940).

Defendant counters that the rationale for preclusion of judicial review of the agency's decision to increase rents applies with equal force to project owners and tenants. In *Langevin v. Chenango Court, Inc.*, Judge Friendly stated that:

> [I]t would be most unusual for Congress to subject to judicial review discretionary action by an agency in administering a contract which Congress authorized it to make. Other factors tending in the direction of nonreviewability are the managerial nature of the responsibilities confided to the FHA, the need for expedition to achieve the Congressional objective, ... and the quantity of appeals that would result if FHA authorizations to increase rents were held reviewable. ...

447 F.2d 296, 303 (2d Cir. 1971) (citations omitted). HUD claims that the decision to increase the rents in this case was a managerial determination of the appropriate rent level for the project. Defendant asserts that there is no greater reason for judicial review here than was presented in other cases simply because the level of

increase is challenged by the project owner rather than the tenants. Defendant also argues that while this court may have jurisdiction under 42 U.S.C. 1404a to review a contract claim, that section does not expand the limited grant of jurisdiction available under the APA. *See Federal National Mortgage Assoc. v. LeCrone,* 868 F.2d 190, 193 (6th Cir.) *cert. denied,* 493 U.S. 936 (1989).

Plaintiff's argument that it is a party to a HUD contract and should not be barred from access to the courts to review an agency decision to correct a mutually acknowledged error in calculation is persuasive. The HAP contract itself contains a clause specifying that further adjustments can be made to cover special circumstances. Section 1.8c of the contract, entitled *Special Additional Adjustments,* reads in pertinent part that:

> Special additional adjustments shall be granted, when approved by the Government, to reflect increases in the actual and necessary expenses of owning and maintaining the Contract Units which have resulted from substantial general increases in real property taxes, utility rates, or similar costs . . . but only if and to the extent that the Owner clearly demonstrates that such general increases have caused increases in the Owner's operating costs which are not adequately compensated for by automatic annual adjustments . . . .

Item 31, Ex. 1. In the event that the Owner disagrees with the implementation of an aspect of the contract, Section 2.8a of the contract provides that:

> [A]ny dispute concerning a question of fact arising under this Contract which is not disposed of by agreement between the [HUD] field office and the Owner may be submitted by the Owner to the Secretary of [HUD]. The decision of the Secretary . . . shall be final and conclusive, unless determined

> by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence.

Section 2.8b explains that:

> This Section does not preclude consideration of questions of law in connection with the decision rendered under paragraph a of this Section; Provided, however, that nothing herein shall be construed as making final the decision of any administrative official, representative, or board, on a question of law.

Item 31, Ex. 1. Significantly, the disputes clause does not except matters over which HUD has "discretion as a matter of law" and specifically permits judicial review.

Unlike the cases cited by the defendant, Jackson Square is challenging a HUD decision made pursuant to a contract between the parties which contains a disputes clause covering the decision. The plaintiff seeks judicial review of the agency's determination that the Buffalo area office properly included Jackson Square's automatic annual adjustment in the 6 percent increase authorized by the Assistant Secetary. The plaintiff has the contractual right to request a special adjustment and disputes the calculations made by HUD's Buffalo office to determine the amount of increase needed to correct the error. This appears to be the kind of disagreement envisioned by the contract's disputes clause. Therefore, the APA's §701(a) exception to judicial review does not apply to plaintiff's second cause of action.

B. Adequate Remedy at Law

The defendant next argues that review under the APA is precluded because Jackson Square has an adequate remedy in contract law. Section 704 provides

that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." The defendant asserts that Jackson Square's suit is contractual in nature, and this court has determined it has jurisdiction over the contract claim under 29 U.S.C. §1331. Therefore, the plaintiff has an adequate remedy in this court under its contract claim, and its cause of action to enforce payment pursuant to a final agency action under the APA does not lie.

Plaintiff contends that defendant cannot argue that plaintiff has an adequate remedy because it does not concede that plaintiff has an enforceable contract claim. It urges that the APA's "exception that was intended to avoid such duplication [of previously established special statutory procedures] should not be construed to defeat the central purpose of providing a broad spectrum of judicial review of agency action. *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988).

According to the allegations in the amended complaint, plaintiff's second cause of action challenges the procedure by which HUD's Buffalo field office refused to implement the Assistant Secretary's authorization to increase Jackson Square's rents by $24 per unit to compensate for a processing error. Although the relationship between the parties is contractually defined, Jackson Square's second cause of action requires the court to interpret a process defined by statute and regulation.

In the cases cited by defendant as authority, §704 is raised as a jurisdictional bar to suit in district court because the plaintiff has an adequate remedy in Claims Court. *See, e.g., Estate of Watson v. Blumenthal*, 586 F.2d 925 (2d Cir. 1978); *Alabama Rural Fire Insurance*

Co. v. Naylor, 530 F.2d 1221 (5th Cir. 1976). In a prior order denying defendant's motion to dismiss, this court determined that its jurisdiction exists, not only for the contract claim, but over the entire suit. Item 33. Without citing any authority, HUD now asserts that a district court with subject matter jurisdiction over a contract claim to which HUD is a party is barred from judicial review of the agency's final determination that its actions regarding the contract were proper based on its empowering statute and regulations. In effect, HUD is arguing that if the plaintiff has a contract claim, it cannot also pursue a cause of action challenging the statutory interpretation of the agency which led to the allegedly erroneous decision resulting in the contract claim.

Even if this anomalous situation could occur, the nature of the relief sought by Jackson Square mandates this court's jurisdiction under the APA. In *Bowen v. Massachusetts,* the Supreme Court clarified that the primary thrust of §704 was to codify the exhaustion requirement but that "Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action . . . . [Section] 704 does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures." 487 U.S. 879, 903 (1988). The Court then analyzed the effect of this section on the exclusive jurisdiction of the Claims Court for suits against the United States for money damages over $10,000. It rejected the restrictive interpretation urged by the Secretary of the Department of Health, Education, and Welfare that §704 should be construced to bar review of the agency action in the district court because monetary relief against the United States is available in the Claims Court under the Tucker Act.

Noting that the Claims Court has no power to grant equitable relief, the *Bowen* Court determined that the availability of review in the Claims Court was doubtful and the nature of the plaintiff's claim "may make it appropriate for judicial review to culminate in the entry of declaratory or injunctive relief that requires the Secretary to modify future practices." 487 U.S. at 905. When the necessary relief may exceed the powers of the Claims Court, the remedy available to the plaintiff in that Court "is plainly not the kind of 'special and adequate review procedure' that will oust a district court of its normal jurisdiction under the APA." 487 U.S. at 904.

The Federal Circuit Court of Appeals recently had an opportunity to apply *Bowen* to a contractually based suit very similar to this case. In *Katz v. Cisneros*, 16 F.3d 1204, 1208 (Fed Cir. 1994), the plaintiff also challenged HUD's calculation of HAP contract rents. The *Katz* court found that there was "no significant distinction" between the kind of relief sought in *Bowen* and that sought by the plaintiff.

> HUD argues that unlike *Bowen* this case involves a contract, which calls for another outcome. This distinction is not determinative. Merely because the challenged regulations are tracked in the language of the contract between [plaintiff] Hollywood Associates and [defendant] does not mean that Hollywood Associates seeks a kind of relief different from that in *Bowen* . . . 'The answer to the sovereign immunity and jurisdiction questions depends not simply on whether a case involves contract issues, but on whether, despite the presence of a contract, plaintiffs' claims are founded only on a contract, or whether they stem from a statute or the Constitution.' "

16 F.3d at 1209, *citing Transohio Sav. Bank v. Director, OTS*, 967 F.2d 598, 609 (D.C. Cir. 1992).

Jackson Square is also seeking prospective and declaratory relief in its second cause of action in challenging HUD's determination not to adjust the rents to cover an error in calculating utility costs. It requests a declaratory judgment that HUD acted improperly in failing to correct the error after the Assistant Secretary gave authorization to do so pursuant to 24 C.F.R. §880.204(b)(1)(i)(B) (1990). This requires the court to review HUD's interpretation of the statute and regulations which governs its decisions. Jackson Square also seeks prospective relief in the form of future payments. Although contractually based, these claims and requests for relief exceed the bounds of a contract action and require statutory and regulatory interpretation. Moreover, Jackson Square's contract claim has been dismissed. Therefore, §704 of the APA does not deny subject matter jurisdiction to this court to adjudicate the second cause of action.

C. Arbitrary and Capricious

HUD next urges that even if the court finds jurisdiction under the APA, the agency is entitled to summary judgment because its decision was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. §706(2)(A). In general, the court is not empowered to conduct a de novo inquiry into the matter being reviewed but should make its decision on the basis of the factual record as it appeared before the agency. *Florida Power and Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). HUD argues that the record clearly shows it acted within its considerable discretion to make special adjustments to project rents, and plaintiff has failed to allege any clear error of judgment.

As discussed above, there is a factual dispute regarding the significance of the Simons letter. The plaintiff maintains that the letter approved rent increases in the amount sought by Jackson Square and constituted a final agency action which HUD failed to implement. HUD argues that this letter merely authorized the Buffalo field office to correct the utility cost error by raising the original rents. The affidavits and deposition excerpts produced by the parties offer support for both contentions and do not make clear the basis for the determination that Jackson Square would not get the requested increase. Clearly, there are genuine issues of facts regarding the decisionmaking process which preclude a grant of summary judgment under the arbitrary and capricious standard.

III. Statute of Limitations

The parties agree that plaintiff's claim for judicial review under the APA is governed by a six-year statute of limitations. HUD contends that plaintiff's claim accrued on October 1, 1980, when HUD advised the plaintiff of the rents it would approve for the project. Since plaintiff waited until 1988 to commence this lawsuit, HUD argues that this claim is time-barred. *See* Items 33, 63, and 69.

Jackson Square replies that after it received notification from HUD that the annual increase in rental assistance would be $17,280 per annum rather than the requested $45,098, it engaged in a series of meetings and communications with HUD in an effort to persuade HUD to make a further contract modification. It was not until July 25, 1983, that HUD notified plaintiff that it would not respond favorably to Jackson Square's claim. Item 40, Ex. 3. In its supplemental memorandum,

Jackson Square argues that its right of action to a judicial review of HUD's administrative determination grounded in the "disputes" provision of the HAP contract did not accrue until May 13, 1988, when HUD informed Jackson Square that it would not "revisit" the dispute. Item 67 at 4, Ex. 9. On February 8, 1988, the plaintiff wrote to the HUD Buffalo office director stating that it had recently obtained HUD documents under the Freedom of Information Act pertaining to the determination to increase Jackson Square's rents which disclosed that the Department's determination in 1980 was "considerably higher" than the actual increase received. Item 67, Ex. 6. The letter further stated that "[t]he records are devoid of any reason or justification for disregarding the increase approved by Washington," and requested reimbursement for $17 per month per unit difference between the authorized and the actual increase. *Id.* HUD's Buffalo office responded that it saw no inconsistency and thought the matter resolved. Jackson Square then submitted the dispute to the Secretary of HUD in accordance with the disputes clause of the HAP contract and was notified by letter dated May 13, 1988, that HUD would do nothing further to resolve the dispute. Plaintiff claims that its administrative remedy pursuant to the disputes clause was exhausted by the issuance of the May 13 letter, and its right of judicial review only accrued on that date.

Jackson Square cites *Crown Coat Front Co. v. United States,* 386 U.S. 503 (1967), to support this argument. In *Crown Coat,* the Supreme Court was asked to determine the accrual date of a claim arising under a disputes clause of a government contract. The Government argued that the date of accrual was the date of the completion of the contract. The *Crown Coat* Court noted that under the contract's terms, the contractor

was required to submit his dispute to an administrative review process which could have taken longer than six years. If the Government's reckoning of the accrual date were correct, the contractor could then be barred from a judicial review of an adverse final agency decision. Thus, the Court determined that the contractor claims first accrues "upon the completion of the administrative proceedings contemplated and required by the provisions of the contract." 386 U.S. at 511. The Court reasoned that:

> Under the typical government contract, the contractor has agreed in effect to convert what otherwise might be claims for breach of contract into claims for equitable adjustment .... [W]hether and to what extent an adjustment is required are questions to be answered by the methods provided in the contract itself. The contractor must present his claim to the contracting officer, whose decision is final unless appealed for final action by the department head or his representative .... [T]he contractor's claim was subject only to administrative, not judicial, determination in the first instance, with the right to resort to the courts only upon the making of that administrative determination.

Id. at 511-12. The Court also noted that the basis for judicial review cannot be ascertained prior to the final agency action because:

> The focus of the court action is the validity of the administrative decision. Until that decision is made, the contractor cannot know what claim he has or on what grounds administrative action may be vulnerable. It is only then that his claim or right to bring a civil action against the United States matures and ... he has the right to demand payment[.]... the hallmark of accrual of a claim ....

Id. at 513-14 (citation omitted). Jackson Square asserts that judicial review of its claim also did not ripen until the HUD secretary refused to reconsider the local office's decision in 1988.

HUD counters that Jackson Square's efforts to persuade the agency to provide further rent increases are only relevant to accrual of the statute of limitations if HUD's review constituted a necessary element of plaintiff's claim. The disputes clause of the contract states that "any dispute . . . under this Contract which is not disposed of by agreement . . . *may* be submitted by the owner to the Secretary . . . ." Item 31, Ex. 1, ¶2.8 (emphasis added). The defendant argues that because Jackson Square was under no obligation to submit the dispute to the Secretary of HUD, *Crown Coat* does not apply. Rather, a permissive administrative remedy does not affect the creation of the plaintiff's rights. *Lins v. United States,* 688 F.2d 784 (Ct. Cl. 1982), *cert. denied,* 459 U.S. 1147 (1983).

HUD further claims that Jackson Square's suit should be barred even if the court finds that appeal under a permissive disputes clause may toll the statute of limitations because the plaintiff did nothing to pursue its claim between 1983 and 1988. HUD points out that, unlike the instant HAP contract, the *Crown Coat* contract included a 30 day deadline for appeal. The Court advised that when a contract has no time limitations of its own, "the contractor cannot delay unreasonably in presenting his claim." 386 U.S. at 519. HUD argues that Jackson Square could easily have kept within a six-year limitations period by acting promptly after receipt of the July 1983 letter.

Plaintiff does not respond to HUD's distinction between the tolling effect of permissive and mandatory administrative review processes. The court's own research has failed to reveal any definitive extension of the *Crown Coat* rule to cases in which the plaintiff chooses to pursue an administrative remedy without being required to do so. On the other hand, as discussed above, both parties agree that this court is limited to a review of a final agency action to determine whether it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. §706(2)(A). The parties disagree about what constitutes final agency action for this purpose, but it is clear that a determination must be made in order to ascertain when Jackson Square's cause of action accrued.

Jackson Square had failed to persuade the court that there was no final agency decision prior to the May 13, 1988, letter from the Secretary of HUD. Mindful of the *Crown Coat* admonition that a plaintiff should not delay unreasonably in pursuing agency review even in the absence of specified time limits, the court cannot agree that the statute of limitations was tolled for five years while plaintiff waited to appeal the last letter it received from the Buffalo field office. Moreover, the Secretary's letter states in plain terms that the agency refused to "revisit" the dispute (Item 67, Ex. 9), indicating that the agency considered the issue closed.

However, HUD's assertion that the final agency action is represented by the October 1, 1980, letter is equally unpersuasive. The parties had submitted into the record a series of letters and memoranda which are dated between February 19, 1980, and July 25, 1983. Items 40, Ex. 3; 43-57; & 67, Exs. 4-5. In addition, Jackson Square maintains without dispute by the defendant that several

meetings and conversations concerning the adjustments occurred during this time period. The October 1, 1980, letter states that "[a]fter a thorough review of supporting documentation, we are approving an adjustment in your contract rents due to an underestimation of the project's utility expense." Item 48. It then details the new rents, which the plaintiff contends were incorrect. There is no terminology to suggest that this is a final determination which the local office had no ability to review. Indeed, a December 24, 1980, letter from the director of the Buffalo field office invites further review. It states that "[a]ny further consideration for additional adjustments will require supporting data and corrected financial statements for FY 1979 .... [I]t is the judgment of this office that we have followed the proper procedure and no additional adjustments are required at this time." Item 51. It is unclear whether Jackson Square subsequently submitted further supporting data. However, it did point out to the local office what it considered a discrepancy between the amount of increase authorized by the Simons letter and the amount actually received. There is no written indication that HUD took into account and rejected Jackson Square's interpretation of the Simons letter until July 22, 1983, when the area manager wrote to Jackson Square that:

> In regard to our July 5, 1983 meeting, you are advised that this Office has reviewed our processing of the rental adjustment to compensate for utility increases and found that is [sic] was consistent with Secretary Simon's memo of August 29, 1980.

Item 40, Ex. 3. Since Jackson Square claims that the Buffalo field office wrongly interpreted the Simons letter and that, by statute, HUD's local office was obliged to implement the approved increases authorized by the

Assistant Secretary, the July 22, 1983, letter is the agency action which most reasonably can be construed as final for purposes of judicial review.

Jackson Square filed this suit in 1988, five years after receipt of the 1983 final agency action and within the six-year statute of limitations. Accordingly, the second cause of action is not time-barred.

CONCLUSION

For the reasons elucidated in this opinion, defendant HUD's motion for summary judgment to dismiss plaintiff Jackson Square's breach of contract action is granted. HUD's motion for summary judgment on the plaintiff's second cause of action is denied. The sole question left to be determined in this lawsuit is whether HUD acted arbitrarily, capriciously, with abuse of discretion, or not in accordance with the law in determining that Jackson Square was not entitled to the full rental adjustment requested.

The court will meet with the parties on November 28, 1994, at 3 p.m. to discuss a further schedule.

So ordered.

s/ JOHN T. CURTIN
John T. Curtin
United States District Judge

Dated: November 8, 1994

STATUTES

42 USC §1437f In Effect August 1980.

§1437f. Lower-income housing assistance

* * *

(c) Contents and purposes of contracts for assistance payments; amount and scope of monthly assistance payments

(1) An assistance contract entered into pursuant to this section shall establish the maximum monthly rent (including utilities and all maintenance and management charges) which the owner is entitled to receive for each dwelling unit with respect to which such assistance payments are to be made. The maximum monthly rent shall not exceed by more than 10 per centum the fair market rental established by the Secretary periodically but not less than annually for existing or newly constructed rental dwelling units of various sizes and types in the market area suitable for occupancy by persons assisted under this section, except that the maximum monthly rent may exceed the fair market rental by more than 10 but not more than 20 per centum where the Secretary determines that special circumstances warrant such higher maximum rent or that such higher rent is necessary to the implementation of a local housing assistance plan as defined in section 1439(a)(5) of this title. In the case of newly constructed and substantially rehabilitated units, the exception in the preceding sentence shall not apply to more than 20 per centum of the total amount of authority to enter into annual contributions contracts for such units which is allocated to an area and obligated with respect to any fiscal year beginning on or after October 1, 1980.

Proposed fair market rentals for an area shall be published in the Federal Register with reasonable time for public comment, and shall become effective upon the date of publication in final form in the Federal Register. Each fair market rental in effect under this subsection shall be adjusted to be effective on October 1 of each year to reflect changes, based on the most recent available data trended so the rentals will be current for the year to which they apply, of rents for existing or newly constructed rental dwelling units, as the case may be, of various sizes and types in the market area suitable for occupancy by persons assisted under this section. Notwithstanding any other provision of this section, after October 12, 1977, the Secretary shall prohibit high-rise elevator projects for families with children unless there is no practical alternative. The Secretary shall establish separate fair market rentals under this paragraph for Westchester County in the State of New York. If units assisted under this section are exempt from local rent control while they are so assisted or otherwise, the maximum monthly rent for such units shall be reasonable in comparison with other units in the market area that are exempt from local rent control.

* * *

24 CFR §880.110 In Effect August 1980.

§880.110 Rent adjustments.

(a) *Funding of Adjustments.* Housing assistance payments will be made in increased amounts commensurate with Contract Rent adjustments under this paragraph, up to the maximum amount authorized under the contract. (See §§880.105 and 880.106.)

(b) *Automatic Annual Adjustments.* (1) Automatic Annual Adjustment Factors will be determined by HUD at least annually interim revisions may be made as market conditions warrant. Such Factors and the basis for their determination will be published in the FEDERAL REGISTER. These published Factors will be reduced appropriately by HUD where utilities are paid directly by Families.

(2) On each anniversary date of the Contract, the Contract Rents shall be adjusted by applying the applicable Automatic Annual Adjustment Factor most recently published by HUD. Contract Rents may be adjusted upward or downward, as may be appropriate; however, in no case shall the adjusted rents be less than the Contract Rents on the effective date of the Contract.

(c) *Special additional adjustments.* Special additional adjustments shall be granted, when approved by HUD, to reflect increases in the actual and necessary expenses of owning and maintaining the Contract units which have resulted from substantial general increases in real property taxes, utility rates, or similar costs (i.e., assessments, and utilities not covered by regulated rates), but only if and to the extent that the Owner clearly demonstrates that such general increases have caused increases in the Owner's operating costs which

are not adequately compensated for by automatic annual adjustments. The Owner shall submit to HUD financial statements which clearly support the increase.

(d) *Overall Limitation.* Notwithstanding any other provisions of this part, adjustments as provided in this section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by HUD; *Provided, however,* That this limitation shall not be construed to prohibit differences in rents between assisted and comparable unassisted units to the extent that such differences may have existed with respect to the initial Contract Rents.

[41 FR 17473, Apr. 26, 1976, as amended at 41 FR 42951, Sept. 29, 1976]

24 CFR §880.204 In Effect August 1980.

§880.204 Limitations on contract rents, replacement costs and amenities.

(a) *Purpose and Applicability of Limitations.* The purpose of the Section 8 program is to assist lower-income families in renting decent, safe and sanitary housing of modest design with suitable amenities. This section sets limitations on the contract rents, replacement costs and amenities of projects constructed under this part. These limitations are intended to permit production of suitable housing without excessive costs, design features or amenities.

(b) *Limitation on Contract Rents.* The contract rents for a project from proposal submission through cost certification, must be within both of the following limitations:

(1) *Fair Market Rent.* The contract rent plus any utility allowance for the unit must not exceed the Fair Market Rent in effect at the time of processing. The published Fair Market Rents will reflect a trended rent in order to allow for the period of construction as stated in the publication. If the scheduled construction time for a project is less, an appropriate reduction will be made in determining the approvable contract rent. The contract rent plus utility allowance may exceed the applicable Fair Market Rent under special circumstances or if needed to implement a local Housing Assistance Plan or Areawide Housing Opportunity Plan:

(i) By up to 10 percent with the approval of the HUD field office manager, or

(ii) By up to 20 percent with the approval of the HUD Assistant Secretary for Housing; and

* * *

[44 FR 59410, Oct. 15, 1979, as amended at 45 FR 18923, Mar. 24, 1980]

EFFECTIVE DATE NOTE: At 45 FR 18923, Mar. 24, 1980, the phrase "by up to 50 percent" in paragraph (c)(iii), was changed to read "by an amount not to exceed 75 percent", effective Apr. 23, 1980.

Affidavit of George H. Roberts,
Sworn to January 22, 1993.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CIV-88-0859C

JACKSON SQUARE ASSOCIATES, a New York Limited Partnership,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Defendant.

STATE OF NEW YORK)
COUNTY OF ERIE) ss:
CITY OF BUFFALO)

GEORGE H. ROBERTS, being duly sworn, deposes and says:

1. I reside at S 5640 East Lane, Lakeview, New York 14085.

2. I was employed by the United States Department of Housing and Urban Development (HUD) from 1968 until 1986. The last position I held was as loan specialist. From November 1970 until October 1986, I was assigned to the Buffalo area office of HUD.

3. One of my fellow employees at the Buffalo area office of HUD was Ronald Lonka.

4. I was aware that the Jackson Square project was part of the portfolio of Ronald Lonka and within his responsibility for supervising such assisted housing projects in Erie County.

5. I was aware that the common area utility costs for the Jackson Square project had been underestimated during the processing of the project. I was also aware that Frank Levin had been notified by the HUD Buffalo office that the 1980 automatic annual adjustment factor for his project had been eliminated or had been subtracted from the additional contract rents approved by the Central office of HUD to compensate Levin for the underestimated common area utility costs that were discovered after the project was occupied in March 1979.

6. Frank Levin had objected to this notification from the HUD Buffalo office and had made continuing efforts to obtain relief from the Buffalo office. My observation of the controversy during my time of service in the Buffalo office of HUD and the reasons given for HUD withholding the 1980 AAAF impressed me that Frank Levin was being unfairly treated. However, the matter was outside my jurisdiction and I made no inquiry or comment concerning it.

7. However, in January 1987, after I left HUD, I had occasion to be at a federal credit union dinner and was seated at a table talking to Mr. Lonka.

8. I said to him, "Why did you throw such a shaft at Frank Levin?"

9. Lonka said, "I harmed (i.e. common scatalogical verb) that Jew but good and I would do it again if I had the chance." I said, "Why would you pick on one project to do that to?" He said, "He was bleeding the project dry." I said, "How was he bleeding it dry? HUD has too many controls to let an owner do that."

10. He said, "He has his own management company. His wife is manager and his son is the superintendent," I said, "It is common practice. So what." He said, "Everything is going into the family and if I had the chance to do it again, I would."

s/ GEORGE H. ROBERTS
George H. Roberts

Subscribed and sworn to before me
this 22nd day of January, 1993.

JOHN J. PHELAN
Notary Public

JOHN J. PHELAN
Notary Public, State of New York
Qualified in Erie County
My Commission Expires July 31, 1994

Letter to Conrad Egan, Acting Director, Office of Multifamily Housing Management and Occupancy From Ronald Lonca, Dated July 17, 1980.

JUL 17 1980

Conrad Egan, Acting Director
Office of Multifamily Housing Management
and Occupancy

2.1HML

James F. Anderson, Buffalo Area Office, 2.1S

Project No. 014-35020/NY06-0004-019
Jackson Square Apartments
Amherst, New York

We are requesting a waiver to adjust the HAP Contract for the subject project due to an underestimation in initial processing and unexpected subsequent increase in non-tenant expenses since the preparation of the firm commitment processing. This project contains 40 one-bedroom units, 60 two-bedroom units, 50 three-bedroom units and 10 four-bedroom units.

Our Maintenance Engineering staff of the Assisted Housing Management Branch reviewed a request from the project and they indicated a rate increase of 27% has occurred since the HAP Contract was executed. Even with this increase, there would still be a shortfall in this account of $39,914 since the actual utility expense for this project amounted to $64,298 for the past year. The current allocation on the 2264, as originally proposed, indicates that utilities would be $19,200 thus causing the project to have a shortfall of $45,098 in utility expense.

The following is an analysis of the needs of this project:

New Utility Adjustments (64,298÷12 = 5,358.160)	33.50
Less: Old Common Area(19,200÷12 = 1,600.160)	10.00
Contract Utilities per 2264	
	23.50 or $24

	FORM 2264 OLD CONTRACT RENT @ HAP	PROPOSED COMMON AREA UTILITIES ADJUSTMENT	PROPOSED NEW ADJUSTED CONTRACT RENT
1	Bedroom 307	24	331
2	" 341	24	365
3	" 390	24	414
4	" 427	24	451

For your further information, we have reviewed the tenant Utility Allowance and have increased it by an average of 21%.

	NEW ADJUSTED CONTRACT RENTS		REVISED TENANT'S UTILITY ALLOWANCE	MARKET RENTS NEEDED
1	Bedroom	331	32	363
1	"	331	34	365
2	"	365	38	403
2	"	363	39	404
2	"	365 365	41	406
2	"	365	43	407
3	"	414	53	467
3	"	414	53	467
4	"	451	59	510
4	"	451 451	64	515

	FAIR MARKET RENT LIMITS		FAIR MARKET RENT LIMITS @ 110%	@ 120%	MARKET RENTS NEEDED
1	Bedroom	317	349	380	363
1	"	317	349	380	365
2	"	366	403	439	403
2	"	366	403	439	404
2	"	366	403	439	406
2	"	366	403	439	407
3	"	431	474	517	463
3	"	431	474	517	467
4	"	457	503	548	510
4	"	457	503	548	515

Based on the above calculations, we are recommending an adjustment in the HAP Contract to increase utilities on the captioned project in the amount of $45,098 (increase in the HAP Contract of 6.0%).

If you have any questions concerning the above, please contact Mr. Charles Meyer, Chief, Loan Management Branch of the Buffalo Area Office at FTS 437-5710.

JAMES F. ANDERSON
Area Manager

2.1HML:LONCA:LBC 7/14/80 T - 5 Days

CORRE-SPON-DENCE	ORIGINATOR	CONCURRENCE	CONCURRENCE	CONCURRENCE
CODE	2.1HML	2.1HML	2.1HM	2.1H
Name	Lonca	Meyer	Izsak	Barton
Date	RL 7/14	CM 7/14	EI 7-14-80	BB 7-15-80

Memorandum From Lawrence B. Simons, Assistant Secretary, to James F. Anderson, Area Manager, Buffalo Area Office, Dated August 29, 1980.

DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
SEAL WASHINGTON, D.C. 20410

Office of the Assistant Secretary for
Housing—Federal Housing Commissioner

In Reply Refer to:

AUG 29, 80

MEMORANDUM FOR: James F. Anderson,
Area Manager
Buffalo Area Office
Buffalo, New York, 2.1S

RECEIVED
DEPT. OF H.U.D.
SEP 5 1980
AREA OFFICE
BUFFALO, N.Y.

SUBJECT: Rent Waiver for Jackson Square Apartments

Your memorandum of July 17, 1980 requested a waiver of the original contract rents for Jackson Square Apartments to allow for a rent increase to improve the cash flow of the project.

In support of your request, you stated that the original contract rents were set too low to meet operating expenses, especially non-tenant utility costs. The rents were set so low due to a processing error which resulted in a gross underestimation of utility expenses which have increased 27 percent since execution of the HAP Contract.

We have reviewed your request and find it reasonable and necessary to adjust the original contract rents to keep the project viable. Therefore, we will approve the following rents:

	Original Contract	*Original Fair Market Rents*	*120% FMR*	*Adjusted Contract Rents*	*Approved Contract Rents*
1BR	$307	$317	$380	$331	$331
2BR	341	366	439	365	365
3BR	390	414	497	414	414
4BR	427	457	548	451	451

Additionally, the approved contract rent may contain the following utility allowance: 1BR - $34; 2BR - $42; 3BR - $53; 4BR - $64. These rents and utility allowance are based on the original processing error and the need documented in your memorandum.

If you have further questions please contact the Office of Multifamily Housing Management and Occupancy, Attention: Operations Division.

Sincerely,

s/ LAWRENCE B. SIMONS
Lawrence B. Simons
Assistant Secretary

Letter From HUD to Mr. David P. Feldman, Attorney for Jackson Square, Dated March 21, 1988.

MAR 21 1988

Mr. David P. Feldman
Gordon, Feldman and Cooper
625 Delaware Avenue
Buffalo, NY 14202-1091

Dear Mr. Feldman:

SUBJECT: Jackson Square Apartments,
Project No. 014-35020,
Amherst, New York

This is in reference to your letter of February 8, 1988, on behalf of your client, Jackson Square Associates. Specifically, you addressed the issue of an adjustment that was made to the contract rents in October 1980, for the Jackson Square Apartments.

This Office has reviewed the documentation you referenced in your letter and fails to see the inconsistency that you described. In 1980 this Office requested and received from our Headquarters permission to increase the contract rents for the above referenced project. In a memorandum dated August 29, 1980 from the Assistant Secretary, approval was received for the following rents: 1 BR, $331, 2 BR, $365, 3 BR, $414, and 4 BR, $451. These were the amounts related to you in our approval letter of October 1, 1980. The reason for these increases, as described in the Headquarters memorandum, was to "keep the project viable". We feel the increases were appropriate.

Further, the Department does not have an obligation to provide for these increases. Increases of this type are provided in extreme cases where it is determined that the viability of the project is in jeopardy. In reviewing the financial history of the subject project it appears that it has been and is currently a viable financial entity.

We trust that this will sufficiently resolve this issue.

Sincerely,

s/ JBL
Joseph B. Lynch
Mnager, 2.2S

cc: File

2.2HML:LoBene:lak 3-8 Rewrite 3-14

Originator	Concurrence
2.2HML	2.2HM
LoBene	Izsak
KL 3/15	EMI 3-15-88

Letter From Abbie J. Weist, Executive Assistant of HUD to Mr. David P. Feldman, Attorney for Jackson Square, Dated May 13, 1988.

Mr. David P. Feldman
Gordon, Feldman and Cooper
Attorneys at Law
625 Delaware Avenue
Buffalo, NY 14202-1091

MAY 13 1988

Dear Mr. Feldman:

Thank you for your letter of April 12, 1988, on behalf of your client, Jackson Square Apartments (Project No. 014-35020) concerning a dispute between your client and our Buffalo Field Office.

In your letter, you requested that our office arbitrate a dispute concerning the determination of utility allowances for Jackson Square Apartments. You claim that these allowances are misrepresented, and that, although Jackson Square was granted a special rent increase for utilities of $7.00 per unit, the increase should have been $24 per unit. You refer to an April 22, 1980 interoffice memorandum from George Penta to Charles Meyer, in which it was relayed that the utilities could warrant an increase of up to $24 per unit.

It is our position that the interoffice memorandum to which you refer, and the $24 figure are irrelevant to the present situation of the project. During development, the owners of Jackson Square Apartments certified that the project expenses, including utilities, were proper and justified. Because of this certification, we see no need to revisit the project's development stage in order to determine if a particular cost, i.e. utility cost, was

properly represented. However, it is the Department's policy to grant special rent increases to certain projects which, absent an increase in cash flow, would not have sufficient operating cash to cover increases in taxes, insurance or utility costs. In this particular case, Jackson Square warranted a special utility allowance increase of $7.00 per unit to keep the project "viable". Any future special increase for utilities will be granted only after the project has provided supporting documentation of both a general utility increase in the area and the project's lack of sufficient operating cash to support that increase.

We hope this information is helpful.

Very sincerely yours,

Abbie J. Weist
Executive Assistant to the
Deputy Assistant Secretary
for Multifamily Housing Programs

cc: HMHM-Reader/Williamson-6172, Malone-6164, Kaplan-6160, 6106, ECKERT, TROPP, DUSFC, ES, HPAS, NYRO
HMHM:WILLIAMSON:dmh-LE#15:5/12/88
HS 78426 CS 174328

Correspondence Code	Originator	Concurrence	Concurrence	Concurrence
	HMHM:	HMHM:	HMHM:	HMH:
Name	WILLIAMSON	HANNON	MALONE	KAPLAN
Date	5/12/88	5-12-8	5/12	5/12

Excerpts of Deposition of Lawrence B. Simons, HUD Assistant Secretary, Dated January 18, 1991.

* * *

[20] A. I don't think necessarily.

Q. Well, if you look at Exhibit 5, isn't that what you were being asked to do, in the first, the top of Exhibit 5, reciting the contract rents contained in the HAP contract as signed?

A. Were being asked for a waiver to adjust the HAP contract.

Q. And did you grant such a waiver?

A. Yes, I did.

Q. When the operation of your agency—

A. I should not say I did. Let me go back. It was approved by my office.

Q. Over Your signature?

A. Right.

Q. In the operation of the agency was your action of August 29th, 1980 final agency action on that subject?

A. It was the final action of my office which was in Washington, D.C., of the total program area.

Q. Was it final agency action? Was Exhibit 6 final agency action on the subject of the matter [21] contained in Exhibit 6?

A. I don't know what you mean by final agency action. Let me answer it this way. As far as the decision on the waiver, it was final agency action. What this letter says was final agency action with regard to the material in this letter.

Q. And I am asking you to examine Exhibits 5 and 6. The decision sets forth in your letter of August 29th, 1980 remedied a processing error that was discovered in

the first year of operation of $45,098 which was compensated to the project sponsor by increase in contract rents for that purpose of $24 per unit per month; isn't that correct?

A. No, it addressed an original processing error. As I read these documents, and believe me I have no other independent knowledge and no area of recollection except these documents, it addressed that processing error by approving the adjustment to the contract rents for this amount of money.

* * *

[28] Q. And that annual adjustment factor is intended to compensate all project sponsors in each of the 34 SMSA's in the country, standard metropolitan?

A. Statistical areas.

Q. Statistical areas for the consumer price index increases in rents during the proceeding year, isn't that so?

A. I don't know how it was calculated, but to the best of my recollection the CPI might be part of it.

Q. If you want, by the way I have a copy of how it is done if you want to look at it.

A. I didn't do that.

Q. Let me show you Plaintiff's Exhibit 2 and do you recognize Plaintiff's Exhibit 2 as notification by HUD to the project sponsor that as of March 13th, 1980 he was entitled to a increase in his contract rents as a result of the annual adjustment factor of 1.048 percent or $15 per unit per month due to the operation of the annual adjustment factor. Do you recognize that [29] letter as so informing you?

A. The letter states an AAAF adjustment of 1.048 and Exhibit A and the contract rents.

Q. When the Buffalo area office submitted to you Exhibit 5 in July of 1980, they failed to notify you that the contract rents effective March 13th, 1980 were as set forth in Exhibit 2, didn't they?

A. This letter does not inform of the change in the contract rents, correct.

Q. Now, as a matter of fact the issue of the processing error which was the subject of Exhibit 5 and Exhibit 6 was as to that subject the annual automatic adjustment factor was completely irrelevant, wasn't it?

A. The issues raised there had nothing to do with the annual adjustment factor.

* * *

[34] A. I don't know. I don't know.

Q. Let me show you Exhibit 7. Now, as you can see from Exhibit 7, after your agency action was transmitted back to the Buffalo area office, the Buffalo area office as has been testified decided that Mr.—that the project sponsor would be awarded $9 per unit per month for the common area utility costs rather than the $24 per unit per month that was recommended and approved in Exhibits 5 and 6, and isn't it a fact that that office had no authority to deviate from your decision contained in Exhibit 6?

A. If the question is were they supposed to follow my, the letter that I sent to them, yes, that's correct.

* * *

Affidavit of Frank Levin In Opposition to Defendant's Motion for Summary Judgment, Dated January 22, 1993.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CIV-88-0859C

JACKSON SQUARE ASSOCIATES, a New York Limited Partnership,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD),

Defendant.

AFFIDAVIT OF PLAINTIFF AND LEGAL ARGUMENT IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK)
COUNTY OF ERIE) ss.
CITY OF BUFFALO)

FRANK LEVIN, being duly sworn, deposes and says:

1. That he is one of the general partners of Jackson Square Associates, the plaintiff named herein.

2. That this affidavit is made in opposition to defendant's motion for summary judgment in favor of the defendant. Deponent will respond to each of the grounds asserted for summary judgment set forth in

defendant's notice of motion dated October 27, 1992. Plaintiff has elected to combine its entire response to defendant's motion in an affidavit of a party because the defendant has combined factual assertions and legal arguments in a single memorandum which is not supported by a party affidavit and it is difficult to distribute his factual and legal contentions in an affidavit and a separate memorandum.

AS TO DEFENDANT'S MOTION ON THE GROUND THAT PLAINTIFF HAS FAILED TO ESTABLISH THE CONTRACT ALLEGED IN THE FIRST CAUSE OF ACTION IN THE AMENDED COMPLAINT

3. The plaintiff's first cause of action in contract is that the parties entered into a housing assistance payment (HAP) contract on March 13, 1979. Thereafter a mutual mistake consisting of a processing error in the estimation of common area utility costs was discovered (Pltf. Dep. Ex. 1, Pg. 2 estimate of annual expense E.7; all the depositions in the action and the deposition exhibits are filed in the office of the Clerk, U.S.D.C., W.D.N.Y.).

4. The existence of the processing error in the pre-occupancy document (Pltf. Dep. Ex.1) was established by deponent and verified by the engineering branch of the Buffalo office of HUD (Pltf. Dep. Ex.3). The underestimation in plaintiff's cost for common area utility costs was confirmed as being $45,098.00.

5. The next step was that the Buffalo office of HUD made a recommendation to the Washington office of HUD to modify the HAP contract so as to correct the $45,098 error. The recommendation was made to the Asst. Secretary of HUD in charge of assisted housing

programs because the error was in excess of the authority of the Buffalo office to correct (Pltf. Dep. Ex.5). The $45,098 error converted to a requested contract rent increase of $24 per month/per unit which exceeded Buffalo's authority which was limited to granting contract rent increases of up to 10% 24 CFR Sec. 880.204(b)(1)(i)(A) and (B).

6. Approval of the correction of the processing error and modification of the HAP contract by Asst. Secretary Lawrence Simons is contained in a letter determination dated August 29, 1980 (Pltf. Dep. Ex.6). Plaintiff contends that Secretary Simons' determination was the final agency action on the subject as well as a modification of the HAP contract.

7. The principal basis for the defendant's motion expressed in its memorandum on pages 1 through 11 (Dated October 27, 1992) is that the determination by Asst. Secretary Simons amounted to an internal HUD memorandum and that final agency action upon the issue took place in a memorandum by Boyd O. Barton, Director, Housing Division, Buffalo area office to the plaintiff dated October 1, 1980 (Pltf. Dep. Ex. 7).

8. Defendant is in error. 24 CFR 204(b)(1)(i)(B) (1990) and its predecessor 24 CFR 204(b)(1)(ii) (1980) (Pltf. Ex. 1 annexed), provided that the determination of this issue had to be made by the Asst. Secretary.

9. Asst. HUD Secretary Simons has testified that the determination contained in his letter of August 29, 1980 was final agency action concerning the processing error which was the subject of the letter determination (Pltf. Dep. Ex.6; Simons Dep. Pages 20, 21).

10. Thus, the motion by defendant for summary judgment because the contract modification was never finally approved by both parties is totally unsupported and incompetent as related to the facts of this action, the applicable federal regulation and the functioning of the defendant agency. The motion on that ground should be denied.

* * *

AS TO DEFENDANT'S CONTENTION THAT AS A MATTER OF LAW HUD'S DECISION WAS NOT ARBITRARY, CAPRICIOUS OR ILLEGAL.

25. In Paragraphs "1" through "6" of this affidavit, deponent has set forth the failure of defendant to carry out the contract modification granted by Asst. Secretary Simons which determination was final agency action as well (Pltf. Dep. Ex.6).

26. The way that the financial loss herein was caused to plaintiff was that the HUD employee in the Buffalo office with the Jackson Square project in his portfolio, with the concurrence of his superiors, unilaterally cancelled plaintiff's grant of its annual automatic adjustment factor (AAAF) which was provided by statute 1437f(c)(2)(A) for all project owners and was provided for in the HAP contract (Pltf. Dep. Ex.11, Pg.4, Sec.1.8b). The annual automatic adjustment increase had been approved for plaintiff after one year's operation on March 13, 1980. The AAAF increase in March 1980 amounted to $28,800 per year (converted to $15 per month/per unit contract rent).

27. The plaintiffs theory of action is that it is entitled by law and contract to the AAAF which had been implemented in March 1980, and for which entitlement the HAP contract was amended at that time as follows:

Approved
Contract Rents
(Effective March 13, 1980)

1 BR	$322
2 BR	$357
3 BR	$409
4 BR	$448

28. In addition thereto, plaintiff contends that as a result of Secretary Simons' substantive determination, it was entitled to adjusted contract rents per unit per month of:

1 BR	$346
2 BR	$381
3 BR	$433
4 BR	$472

29. We emphasize that the approved contract rents which carry out Secretary Simons' approval of a $24/per month/per unit increase to compensate plaintiff for the error in the estimated common area utility costs are inaccurate because the recital of the pre-existing contract rents for the project in the submission to Secretary Simons by the Buffalo office was inaccurate (Pltf. Dep. Ex.5) as was testified in his deposition by Ronald Lonka, the Buffalo office HUD employee in charge of Jackson Square, who prepared such memorandum (Lonka Dep., Pg.44).

30. The conduct of HUD is arbitrary, capricious and illegal because the statutory and contractual mandate to award an AAAF to plaintiff in 1980 was not carried out and the final agency action of Secretary Simons was not implemented in accordance with his substantive determination to compensate Jackson Square in full for the $45,098 shortfall in common area utility costs.

31. Plaintiff intends to establish such facts on a trial of this action from admissions in the deposition testimony of HUD employees, from HUD employees as witnesses and form independent witnesses.

32. David Rubin, Supervisory Engineer, Assisted Housing Division, the HUD Buffalo area office with twenty-five years experience testified that the plaintiff should have been granted the $45,098 income increase ($24 per month/per unit/per year) contained in the HAP contract modification due to the processing error together with the $28,800 income increase granted the project ($15 per month/per unit/per year) due to the AAAF granted on March 13, 1980 (D. Rubin Dep. Pages 33-35).

33. Ronald Lonka, the senior loan specialist at the Buffalo office of HUD in whose portfolio the plaintiff project was contained, testified in his deposition that although the Asst. Secretary of HUD had approved a $24 per month per unit increase for the processing error in the common area utility costs in the contract rent, that he and his supervisors elected to eliminate the automatic annual adjustment from plaintiff's income entitlement which had been granted plaintiff on March 13, 1980 and which was provided for by statute, 42 USC Sec. 1437f(c)(2)(A) and by the HAP contract without submitting the issue to the Asst. Secretary for a further determination (Lonka Dep. Pages 45-47).

34. In the first full paragraph in Page 17 of its memorandum, defendant contends that the determination of Secretary Simons correcting the $45,098 processing error which occurred in regard to this project was a special adjustment in plaintiff's contract rent and that such adjustment is provided only to the extent that HUD determines that increases in operating costs are not adequately compensated for by automatic annual adjustments. That is their defense to this action and it pertains to their interpretation of 24 CFR 880.609(a) and (b) and their claim that such section is applicable to this case.

35. That defense fails for these reasons: 1. the determination by Secretary Simons corrected a pre-operation substantial error by HUD in the original processing for which the procedure provided 24 CFR 880.204 (b)(2)(iii) is applicable. The existing practice regarding pre-occupancy processing errors was operative regarding the controversy related to this project (David Rubin Deposition. Pgs.33-35); 2. assuming without conceding that the utility cost deficiency was an operating phase cost and that 24 CFR Sec. 880.609(a) and (b) are applicable, plaintiff contends that the deficiency in utility costs established by plaintiff were substantially in excess of the utility component of the total automatic annual adjustment (AAAF) and as a matter of fact entitled plaintiff to the $45,098 awarded plaintiff by Secretary Simons to compensate plaintiff for such costs; 3. any determination that the AAAF adequately compensated plaintiff for a portion of the HUD error in underestimating utility costs which the engineering section of HUD had verified as $45,098 had to be made by Asst. Secretary Simons. That issue together with the issue whether the utility cost underestimation was a pre-operation processing error

covered by 24 CFR Sec. 880.204(b)(2)(iii) or an operating deficiency covered by 24 CFR Sec. 880.609(b) was required to be made by Asst. Secretary Simons. In any event, such a determination is a question of fact.

36. The Secretary's decision was limited to determining that plaintiff had sustained a processing error related to common area utility costs which amounted to $45,098 and that such error should be remedied by amending Exhibit A of the plaintiff's HAP contract to provide additional contract rents of $24 per month/per unit to compensate plaintiff for all its uncompensated common area utility costs. That was a final determination and plaintiff should be entitled to enforce it.

37. Defendant contends further on Page 17 of his memorandum dated October 27, 1992, that HUD acted in an non-arbitrary manner. Deponent denies that claim. Plaintiff has evidence it intends to offer on a trial of this action that Ronald Lonka, the HUD employee in whose portfolio the plaintiff project was contained, was motivated to reduce the income flowing to Jackson Square by discrimination against the plaintiff. The evidence will be furnished by George H. Roberts, who was a fellow employee of Mr. Lonka at the time this issue first arose in the HUD Buffalo office. An affidavit by Mr. Roberts setting forth his evidence is submitted with the plaintiff's answering papers upon the motion herein, is annexed as Exhibit 2 to this affidavit and is a further ground for the denial of defendant's motion for summary judgment for insufficiency and because there are issues of fact in this action to be determined on a trial of the action.

* * *

41. For all the reasons set forth herein, the motion of the defendant on this ground should be denied and the motion for summary judgment should be denied in its entirety.

s/ FRANK LEVIN
Frank Levin

Subscribed and sworn to before me
this 22nd day of January, 1993.

TAMMY L. MAJOR (TRAUTWEIN)
Notary Public

TAMMY L. MAJOR
Notary Public, State of New York
Qualified in Erie County
My Commission Expires April 20, 1994

Supreme Court, U.S.
FILED
AUG 6 1997
CLERK

(2)

No. 96-1937

In the Supreme Court of the United States

OCTOBER TERM, 1996

JACKSON SQUARE ASSOCIATES, PETITIONER

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Department of Housing and Urban Development correctly determined that petitioner was ineligible for a special rent adjustment of six percent over the automatic annual adjustment factor contained in its "housing assistance payments" contract.

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In the Supreme Court of the United States

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No. 96-1937

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v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is unpublished, but the decision is noted at 108 F.3d 329 (Table). The opinions of the district court (Pet. App. A8-A51) are reported at 927 F. Supp. 75, 869 F. Supp. 133, and 797 F. Supp. 242.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 1997. The petition for a writ of certiorari was filed on June 4, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Pursuant to 42 U.S.C. 1437f, the United States Department of Housing and Urban Development (HUD) helps low-income families obtain adequate housing. Under the federal program at issue in this case, owners of newly constructed housing could obtain mortgages insured by HUD and receive rent assistance payments from the government in return for renting to low-income tenants; each tenant would make rent payments based upon his or her income, and HUD would pay the owner the difference between the tenant's payment and the actual rent.[1] A landlord wishing to participate in the program would enter into a "housing assistance payments" (HAP) contract with HUD. See 42 U.S.C. 1437f(c). Under HUD regulations, each HAP contract was to set forth, among other matters, the amount of rent assistance payments that HUD would make to the landlord, the actual rent for each unit, and the method by which the rent would be adjusted over time. See 24 C.F.R. 880.201 *et seq.* (1979).

2. In 1979, HUD entered into a HAP contract with petitioner Jackson Square Associates, which owned a 160-unit low-income housing development in Amherst, New York. Pet. App. A9-A10. The contract set forth the following rents:

40 one-bedroom units,	$307 per month
60 two-bedroom units,	$341 per month

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[1] In 1983, Congress repealed the new-housing construction program. See Supplemental Appropriations Act, 1984, Pub. L. No. 98-181, § 209, 97 Stat. 1183. That repeal, however, did not affect HUD's obligation to pay rent allowances under existing contracts.

50 three-bedroom units, $390 per month
10 four-bedroom units, $427 per month

Id. at A10. The contract specified two ways in which the prescribed rent could be adjusted. One method provided for increases based on an "Automatic Annual Adjustment Factor" (AAAF) developed by HUD to reflect general economic conditions. See *id.* at A11; see generally *Cisneros* v. *Alpine Ridge Group*, 508 U.S. 10 (1993). On each anniversary date of the HAP contract, the rents specified in the contract were to be automatically adjusted using the AAAF most recently published in the Federal Register. Pet. App. A11. The other method allowed for a special additional adjustment to reflect increases in actual and necessary expenses incurred by the owner in operating and maintaining the housing units. *Id.* at A14. The owner had the burden of proving that substantial general increases in real property taxes, utility rates, and the like caused "increases in the owner's operating costs *which are not adequately compensated for by automatic annual adjustments.*" *Ibid.* (emphasis omitted in part).

In June 1980, petitioner told HUD that it had substantially underestimated the utility expenses for the common areas of the housing units. Pet. App. A10. It submitted the actual utility costs for the previous 12 months—$64,297.74—and requested a rent increase.[2] *Ibid.* On July 17, 1980, the Buffalo Office

[2] Previously, HUD had estimated that the utility costs for the common areas of the housing units would be about $69,000 per year. Pet. App. A10. Petitioner had disagreed with that estimate and had certified that the costs would be only $19,200 per year. *Ibid.* HUD had adopted petitioner's low estimate because petitioner had represented that it was based on an engineering study. *Ibid.*

prepared an internal proposal addressing petitioner's utility costs. *Id.* at A11. It proposed both a rent increase of $24 per apartment and a higher tenants' utility allowance. *Ibid.* In making those calculations, however, the Buffalo Office did not take into account the fact that, under the AAAF, petitioner had already received an automatic 4.8% rent increase for 1980. *Id.* at A12 n.2.

In an internal memorandum dated August 29, 1980, HUD's Assistant Secretary for Housing adopted the Buffalo Office's proposal and approved the following new rents:

40 one-bedroom units,	$331 per month
60 two-bedroom units,	$365 per month
50 three-bedroom units,	$414 per month
10 four-bedroom units,	$451 per month

Pet. App. A12. That $24 per unit increase entitled petitioner to a six percent overall increase in rents.

3. In October 1980, the Buffalo Office informed petitioner of the new schedule approved by the Assistant Secretary. Pet. App. A13. The final figures were the same as in the Assistant Secretary's memorandum (which petitioner did not see until December 1980), but the Buffalo Office specified that the rent increase incorporated the 4.8% increase based on the AAAF. *Id.* at A13, A32. Petitioner claimed that it was entitled to an additional six percent increase *on top of* the AAAF, for a total increase of 10.8%. *Id.* at A16, A32. In July 1983, the Buffalo Office denied that claim on the ground that, despite petitioner's argument to the contrary, the six percent increase approved in October 1980 was "consistent with [the Assistant Secretary's] memo of August 29, 1980." *Id.* at A32.

In 1988, petitioner again filed a claim with the Buffalo Office for the difference in past and future payments between what it received under the October 1980 increases and what it would have received if it had been granted a 10.8% increase. Pet. App. A32-A33. The Buffalo Office denied the claim, and the Secretary of HUD denied petitioner's administrative appeal. *Id.* at A33.

4. Petitioner next filed suit in district court, claiming breach of contract and violations of the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* (APA). See Pet. App. A30-A31. In 1994, the court granted summary judgment in favor of HUD on the breach-of-contract claim. *Id.* at A33-A37. In 1995, however, the court remanded the case to HUD for further development of the portions of the record relevant to petitioner's APA claim. See *id.* at A18.

In May 1996, the district court granted summary judgment to HUD on that claim as well. The court first rejected petitioner's argument that the Buffalo Office was without authority to treat the 4.8% AAAF for 1980 as incorporated within the $24 per unit rent increase approved by the Secretary. The court observed that the final agency action in this case was the Buffalo Office's July 1983 rent determination, not (as petitioner had argued) the Assistant Secretary's internal memorandum of August 29, 1980. Pet. App. A18-A22. Nothing in the governing statute or regulations, the court added, requires the Assistant Secretary himself to make final rent determinations; although the Assistant Secretary must approve decisions to set rents above 110% (up to a maximum of 120%) of the "fair market" rent, HUD's regional offices retain "authority to depart from the [Secretary's] approved maximum levels." *Id.* at A22. More-

over, the court noted, "the language of the Assistant Secretary himself [in the internal memorandum] seems to contemplate that his approval was just one interim part of the HUD decisionmaking process." *Ibid.*

The court also determined that it was not arbitrary or capricious for HUD to approve a rent adjustment of only 1.2% over the AAAF. Pet. App. A22-A23. Because the plain language of the contract "states that the AAAF must be calculated into any requested special additional adjustments," the court concluded that HUD's decision was reasonable. *Id.* at A23. The court also rejected petitioner's additional allegation that bias against petitioner's president had affected the agency's decision; that decision, the court reasoned, "was not only proper, but was required by * * * the HAP contract," and therefore cannot be said to have resulted from any alleged bias. *Id.* at A24.

5. In a summary order, the court of appeals affirmed the district court's judgment "for substantially the reasons stated by the district court." Pet. App. A3.

ARGUMENT

The unpublished summary decision of the court of appeals was correct, and it does not conflict with any decision of this Court or of another court of appeals. Further review is therefore not warranted.

1. Petitioner first argues (Pet. 7-9) that the district court violated its right to a jury trial under the Seventh Amendment. Petitioner did not raise that claim either in the district court or in the court of appeals, and those courts did not address it; the claim is therefore not properly presented for this Court's review. See, *e.g.*, *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per curiam). In any event, the

claim would be without merit even if it were properly presented. Under principles of sovereign immunity, "[i]t has long been settled that the Seventh Amendment right to trial by jury does not apply in actions against the Federal Government," *Lehman* v. *Nakshian*, 453 U.S. 156, 160 (1981), unless "Congress [has] clearly and unequivocally departed from its usual practice * * * and granted a right to trial by jury," *id.* at 162. Congress granted no such right here. See 5 U.S.C. 702; 42 U.S.C. 1404a.

2. Petitioner next contends that the Buffalo Office improperly "overruled" the Assistant Secretary's August 1980 internal memorandum approving a rent adjustment of $24 per unit. Pet. 10-14. That claim is also without merit. The Buffalo Office in fact implemented the exact rent levels approved by the Assistant Secretary, and that Office's decision to treat those rent levels as incorporating the 1980 AAAF was a proper means of reconciling the Assistant Secretary's internal memorandum with the terms of the HAP contract, see p. 3, *supra*, and with HUD regulations, see 24 C.F.R. 880.110(c) (1979) (special rent adjustments may be granted only to extent that owner's operating costs are not adequately covered by automatic annual adjustments); 24 C.F.R. 880.609(b) (1980) (same).[3]

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[3] Despite petitioner's contrary suggestion (see Pet. 10), *Camp* v. *Pitts*, 411 U.S. 138 (1973), has no relevance here. In *Pitts*, this Court held that, in reviewing agency action, a court may take into account an agency's "contemporaneous explanation" of its decision. See *id.* at 139, 143. The "explanation" that petitioner cites here, however, was not "contemporaneous" with the agency's decision, but appears instead in a deposition (of the Assistant Secretary) taken many years after that decision. See Pet. App. A71 (noting that "I

3. Relying on *Cisneros* v. *Alpine Ridge Group*, 508 U.S. 10 (1993), petitioner also argues that, to justify a "cancellation" of an AAAF benefit, HUD must first conduct a "comparability study" measuring HUD-assisted rents against unassisted rents in the private market. Pet. 15. That contention is also unavailing. HUD did not "cancel" an AAAF benefit. Instead, it granted an AAAF increase and took that increase into account in determining how much of an additional rent increase petitioner needed to cover its operating costs. Nothing in *Alpine Ridge* suggests that, before taking that action, HUD was required to conduct a "comparability study."

4. Finally, there is no merit to petitioner's contention (Pet. 16-17) that bias tainted HUD's decision. As the district court determined (see Pet. App. A24), the agency's decision was in fact "required by * * * the HAP contract," and therefore "any alleged bias on the part of [HUD] is irrelevant to this action." Apart from its erroneous claim that HUD's decision was substantively incorrect, petitioner offers no basis for contesting that determination.

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have no other independent knowledge and no area of recollection except these documents"). Moreover, although the Assistant Secretary testified in that deposition that he had considered his internal memorandum the final action of his office and had anticipated that HUD's staff would follow it, see *id.* at A70-A72, that does not mean that he intended his memorandum to preclude the staff from taking into account either the terms of the contract at issue here or the regulations governing HAP contracts generally.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 96-1937

IN THE

Supreme Court of the United States

October Term, 1996

JACKSON SQUARE ASSOCIATES,
a New York Limited Partnership,
Petitioner,

vs.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Buffalo Office-Region II,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO THE NEW QUESTION AND NEW ISSUES IN RESPONDENT'S BRIEF

The Contrasting Statements of the Case.

The Statement of the Case by petitioner described an informal agency adjudication, an order per 5 U.S.C. Sec. 551(6), by the Assistant Secretary of HUD required by an Act of Congress, 42 U.S.C. Sec. 1437f(c)(1) (A52).

The Statement of respondent described the agency staff rationale to vary the Secretary's order as a special adjustment of the project rents during operation. 24 CFR 880.201 *et seq.* (A54).

The Secretary's final informal adjudication corrected a processing error (A64) pursuant to a request from the Buffalo Area Manager to correct a processing error (A61). A processing error correction is a well accepted event resulting in rent adjustments *Terrance Housing Associates vs. Cisneros,* 32 F3d 461 (10th Cir. 1994), 24 CFR 882.507(c) and 880.408(d)(1).

The petitioner's and the respondent's statements demonstrate the factual contentions of the parties framing the issue of Congressional intent in the mandate to the Secretary of HUD in 42 U.S.C. Sec. 1437f(c)(1).

The Secretary's order corrected a processing error of $45,080 per year in petitioner's Housing Assistance Payments (HAP) contract (A64).

The agency staff purported to make an operating special adjustment of $13,450 per annum in petitioner's HAP contract (A14-A17).

Further respondent raises new matter contending petitioner is not entitled to a jury trial, an issue decided below in favor of petitioner (SA1-SA12) and not appealed and further new matter justifying the unrefuted racial and religious discrimination by agency staff (A58-A60, A18) by the new claim that the conduct of the guilty agency staff was required by the statute (Resp. br. 8).

REASONS IN REPLY FOR GRANTING THE WRIT.

I. The District Court Held This Is Not A Case Of Waiver Of United States Sovereign Immunity As Respondent Contends. HUD Did Not Appeal.

(a) Respondent urges that *Lehman vs. Nakshian,* 453 U.S. 156 (1981) controls petitioner's right to a jury trial because this case involves a waiver of sovereign immunity by the United States and the Congress did not expressly provide for a jury trial in the statute waiving sovereign immunity (42 U.S.C. Sec. 1404a).

The District Court in this case has decided that petitioner's suit for breach of contract against respondent authorized in 42 U.S.C. Sec. 1404a does not involve a waiver of sovereign immunity by the United States. *Jackson Square Associates vs. U.S. Dept. of Housing and Urban Development,* 797 F.S. 242 (WDNY 1992) (SA1-SA11).

The District Court held that 42 U.S.C. Sec. 1404a is a waiver of sovereign immunity by the Secretary of the U.S. Dept. of Housing and Urban Development (HUD) pertaining to 42 U.S.C. Sec. 1437f, a waiver of sovereign immunity limited to the funds in the control of such Secretary and is a suit cognizable in U.S. District Court and not in the Court of Claims. *Jackson Square, supra*

(SA1-SA11). The authority for the District Court decision is *C.H. Sanders vs. BHAP Housing Development Fund Company,* 903 F2d 114 (2d Cir. 1990).

The right to a jury trial is an incident of the grant of exclusive jurisdiction in the District Courts. *United States vs. Pfitsch,* 256 U.S. 547 (1921) cited by Justice Brennan in dissent (Pg. 175) in *Lehman vs. Nakshian, supra.*

Respondent did not appeal from that order. It is the law of the case.

(b) Respondent urges that petitioner did not raise the claim of a jury trial earlier in the case.

Petitioner demanded a jury trial in its amended complaint dated November 15, 1990 (SA12) and urged in the Courts below that petitioner was entitled to a trial of the issues of its breach of the Housing Assistance Payments (HAP) contract cause of action (A35-A37). Respondent has not moved to strike petitioner's demand for a jury trial. Fed. Rules of Civ. Prac. 39(a), *Lehman vs. Nakshian, supra.*

(c) Petitioner urges that the decision of the District Court in *Jackson Square, supra* (SA1-SA11) following *C.H. Sanders, supra,* that 42 U.S.C. Sec. 1404a contains a waiver of sovereign immunity of HUD and not the United States and that this is a case cognizable in U.S. District Court and not in the Court of Claims are issues in which there is a conflict among the U.S. Courts of Appeal demonstrated by *Portsmouth Redevelopment & Housing Authority vs. Pierce,* 706 F2d 471 (4th Cir.) *cert. denied* 464 U.S. 960 (1983). This Court should grant review of such issues in this case.

II. The District Court Made Its Decision In Violation Of A Congressional Mandate. Respondent Avoids The Issue.

This is a case in which a HUD Secretary made an informal agency adjudication (A64), a 5 U.S.C. Sec. 551(6) order and agency field office staff did not carry it out (A14-A17). Agency staff overruled the Secretary.

The District Court confronted the issue squarely and held that because Congress did not prohibit agency staff from overruling the HUD Secretary when it mandated that a decision be made by him (42 U.S.C. Sec. 1437f), agency staff was authorized to change his order (A22).

That is an issue of Congressional intent that this Court should review.

Respondent attempts to avoid the issue by referring to HAP contract operating adjustments (Resp. br. 3,4). The Secretary corrected an original processing error in the original contract rents (A64). He said so (A71). His decision had nothing to do with an AAAF adjustment. He said so (A72). The special adjustment claim (24 CFR Sec. 880.110(c) (A54)) was an agency staff rationale for overruling the HUD Secretary (A14-A17).

The issue for review by this Court is Congressional intent under 42 U.S.C. Sec. 1437(c)(1) and whether the Congressional failure to prohibit agency staff from overruling a Secretary's order pursuant to 5 U.S.C. Sec. 551(6) authorized agency staff to vary that order as the District Court held it was authorized to do (A22).

III. *Cisneros vs. Alpine Ridge Group,* 508 U.S. 10 (1993) Compels Respondent To Justify Agency Staff Overruling Its Secretary.

Petitioner's contract right to the AAAF increase of March 13, 1980 was fixed by *Cisneros vs. Alpine Ridge Group,* 508 U.S. 10 (1993).

Cisneros vs. Alpine Ridge Group, supra, compels respondent to concede the March 13, 1980 AAAF increase and to argue that agency staff overruled the Secretary by reducing his order correcting the processing error from $46,080 per annum to $13,450 per annum (Resp. br. 8, A14).

Thus respondent argues agency staff were authorized to vary the Secretary's order of August 29, 1980 by reducing his award to petitioner from $46,080 per annum to $13,450 per annum (A14), the amount of the six months earlier AAAF increase (A12). The HUD Secretary explanation of his order (A64) was that it had nothing to do with the AAAF increase (A72). This is an issue of agency power and right which affects more than this case and more than HUD. It should be reviewed by this Court.

IV. Unrefuted Racial And Religious Discrimination Should Not Be Tolerated In Federal Decision Making.

Agency staff exercised alleged discretionary power to vary a Secretary's order (A14) in a case in which racial and religious discrimination by the key field officer was established by the affidavit of a fellow HUD employee and unrefuted (A58-A60, A18).

This Court has held repeatedly that when evidence of invidious discrimination has been produced, and the party charged does not come forward with a neutral

explanation for the conduct, the tainted decision will be reversed. In this case HUD was ordered to provide a neutral explanation and failed to do so (A18). *Batson vs. Kentucky,* 476 U.S. 79 (1980); *Casteneda vs. Pastida,* 430 U.S. 482 (1977); *Village of Arlington Heights vs. Metro Housing Division,* 429 U.S. 252 (1977).

Respondent seeks to avoid the tainted agency staff decision by its new claim that it was a "required" decision (Resp. br. 8). The argument is unworthy.

The issue deserves review by this Court.

CONCLUSION

For the reasons set forth in the Petition for Certiorari and for the reasons set forth in this Reply to the Brief in Opposition, the Petition for a Writ of Certiorari should be granted.

Dated: August 13, 1997
Buffalo, New York

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

Decision and Order of Honorable John T. Curtin, United States District Judge, Dated August 10, 1992.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ATTEST: A TRUE COPY
U.S. DISTRICT COURT, WDNY
RODNEY C. EARLY, CLERK
By J. McCARTHY
Deputy Clerk
Original Filed 8-11-92

88-CV-859C

JACKSON SQUARE ASSOCIATES,
a New York Limited Partnership,

Plaintiff,

-vs-

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,
Buffalo Office—Region II,

Defendant.

APPEARANCES:

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DENNIS C. VACCO, ESQ., United States Attorney (SUSAN W. SCHOEPPERLE, ESQ., Assistant United States Attorney, of Counsel), Buffalo, New York, for Defendant.

BACKGROUND

This case stems from a dispute over the amount of payments due under a Housing Assistance Payments ("HAP") contract between plaintiff, Jackson Square Associates ("Jackson Square"), and defendant, the United States Department of Housing and Urban Development ("HUD"). Several motions are pending. First, plaintiff has moved to strike several affirmative defenses offered by defendant. Item 12. Second, plaintiff has moved to amend its complaint. Item 17. Third, defendant has moved to dismiss the complaint or have the case transferred to the Claims Court, pursuant to 28 U.S.C. §1631, for lack of subject matter jurisdiction in this court. After a brief review of the facts, the court will address each motion in turn.

FACTS

Jackson Square owns a 160-unit low-income housing development in the Town of Amherst, New York. Effective March 13, 1979, Jackson Square entered into a HAP contract with HUD, pursuant to 42 U.S.C. §1437f, under which HUD agreed to make rental assistance payments to Jackson Square for the development's eligible tenants. *See* Item 17, Exh. 1 (HAP contract). Included within the contract was an allowance for the expected utility expenses of Jackson Square. *Id.* Shortly after commencement of the contract, however, it was determined that a mistake had been made which caused Jackson Square's utility expenses to be greatly underestimated. On July 17, 1979*, the Buffalo area office of HUD recommended to the national HUD office that Jackson Square's utility allowance should be adjusted upward by $24 per month, per unit. Item 17, Exh. 2. By letter of August 29, 1979*, this

* District Court Error. 1979 Should be 1980 (A10, A12).

requested increase was apparently approved by Lawrence B. Simons, Assistant Secretary for HUD in Washington, D.C. Item 17, Exh. 3. Plaintiff alleges that this adjustment was never made. It seeks damages of several hundred thousand dollars to cover past and future alleged shortfalls. *See* Item 17 (proposed amended complaint).

DISCUSSION

Plaintiff has moved to strike four of the six affirmative defenses contained in defendant's answer. Item 12. Defendant does not object to having its sixth defense—failure to exhaust administrative remedies—stricken, but opposes the motion for the other three defenses. Item 21, ¶6. Plaintiff's motion is denied. *See National Union Fire Ins. Co. of Pittsburgh v. Alexander,* 728 F. Supp. 192, 203 (S.D.N.Y. 1989).

Plaintiff has also moved to file an amended complaint. Item 17. "[L]eave [to amend a complaint] shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). *See Foman v. Davis,* 371 U.S. 178, 182 (1962); *Ryder Energy Distribution v. Merrill Lynch Commodities,* 748 F.2d 774, 783 (2d Cir. 1984). In order to adequately test the merits of plaintiff's complaint, this motion is hereby granted.

That brings the court to the main issue currently before it, *viz.,* whether this court has jurisdiction over plaintiff's amended complaint or whether, under the Tucker Act, 28 U.S.C. §1346(a)(2), the case must be transferred to the Claims Court. Before proceeding, however, the court cautions that the case law in this area appears to lead toward contradictory conclusions.

Many, if not most, courts have concluded that jurisdiction under the Tucker Act is exclusive in the United States Claims Court, pursuant to 28 U.S.C. §1346(a)(2), if three conditions are met:

> (1) the action is against the United States;
> (2) the action is founded upon the Constitution, federal statute, executive regulation, or government contract; and (3) the action seeks monetary relief in excess of $10,000.

Amoco Prod. Co. v. Hodel, 815 F.2d 352, 359 (5th Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988). *See United States v. Hohri*, 482 U.S. 64, 66 n.1 (1987); *Alan Guttmacher Inst. v. McPherson*, 805 F.2d 1088, 1096 (2d Cir. 1986); *A.E. Finley & Assoc., Inc. v. United States*, 898 F.2d 1165, 1167 (6th Cir. 1990); *Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 675 (8th Cir. 1986); *Hahn v. United States*, 757 F.2d 581, 586 (3d Cir. 1985); *Portsmouth Redevelopment & Hous. Auth. v. Pierce*, 706 F.2d 471, 473 (4th Cir.), *cert. denied*, 464 U.S. 960 (1983); *Homewood Corp. v. Kemp*, 786 F. Supp. 1315, 1318-19 (S.D. Ohio 1992); *Carlyle Gardens Co. v. Delaware State Hous. Auth.*, 659 F. Supp. 1300, 1307 (D. Del. 1987). *Cf. Tennesee ex rel. Leech v. Dole*, 749 F.2d 331, 335 (6th Cir. 1984), *cert. denied*, 472 U.S. 1018 (1985) (concluding that Claims Court jurisdiction was exclusive only for suits "founded on contract" involving more than $10,000). More importantly, for the most part these cases also hold that to satisfy the first condition,

> [i]t is not necessary that the United States be denominated as a party. An action against a federal agency or official will be treated as an action against the sovereign if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or compel it to act."

Portsmouth Redevelopment & Hous. Auth., 706 F.2d at 473 (quoting *Dugan v. Rank*, 372 U.S. 609, 620 (1963)). *See also Amoco Prod. Co.*, 815 F.2d at 359; *B.K. Instrument, Inc. v. United States*, 715 F.2d 713, 723-24 (2d Cir. 1983). Thus, under this line of analysis, the first inquiry for a district court is to determine the source of funds sought to be recovered by plaintiff in its action. If the judgment sought could be paid out of separate funds in the control of the federal agency sued, the suit would not be against the sovereign. *E.g., Weeks Constr., Inc.*, 797 F.2d at 675 & n.9; *Industrial Indem. Inc. v. Landrieu*, 615 F.2d 644, 646 (5th Cir. 1980); *Marcus Garvey Square, Inc. v. Winston Burnett Constr. Co. of Cal.*, 595 F.2d 1126, 1131 (9th Cir. 1979); *Carlyle Gardens Co.*, 659 F. Supp. at 1304. But if the judgment sought could only come from the public treasury, then the suit must be considered to be against the United States. *E.g., Dugan v. Rank*, 372 U.S. at 620; *Amoco Prod. Co.*, 815 F.2d at 359; *Portsmouth Redevelopment & Hous. Auth.*, 706 F.2d at 473. If the suit is determined to be against the United States and the other two conditions are also satisfied, the suit must be dismissed by the district court, or transferred to the Claims Court. *Amoco Prod. Co.*, 815 F.2d at 368; *Portsmouth Redevelopment & Hous. Auth.*, 706 F.2d at 475.

The Second Circuit, in the recent case of *C.H. Sanders Company v. BHAP Housing Development Fund Company*, 903 F.2d 114, 119 (2d Cir. 1990), has undertaken an analysis somewhat different from the cases cited above. Under *Sanders*, jurisdiction may be found in a district court if two conditions are satisfied: First, there must be a grant of subject matter jurisdiction; and second, there must be a valid waiver of sovereign immunity. *Id.* at 117. *See also Falls Riverway Realty v. City of Niagara Falls*, 754 F.2d 49, 54 (2d Cir.

1985); *S.S. Silberblatt, Inc. v. East Harlem Pilot Block—Bldg. 1 Hous. Dev. Fund Co.*, 608 F.2d 28, 35 (2d Cir. 1979); *FHM Constructors, Inc. v. Village of Canton Hous. Auth.*, 779 F. Supp. 677, 680 (N.D.N.Y. 1992); *Lattimore v. Northwest Coop. Homes Ass'n*, 1992 WL 118383 (D.D.C. May 19, 1992); *Ghent v. Lynn*, 392 F. Supp. 879, 880-81 (D. Conn. 1975).

The Tucker Act satisfies both requirements with respect to non-tort claims " 'against the United States . . . founded . . . upon any express or implied contract with the United States.' " *Sanders*, 903 F.2d at 119 (quoting 28 U.S.C. §1346(a)(2)). The Tucker Act, however, only permits such actions in district court if the amount sought is $10,000 or less. *Id.* Actions may be brought in the Claims Court for any amount. *Id.*; 28 U.S.C. §1491(a)(1).

In *Sanders*, as here, the government argued that these statutory provisions established *exclusive* jurisdiction in the Claims Court for claims exceeding $10,000. The Second Circuit, however, rejected this argument.

> We hold that an action (regardless of the amount sought) may be commenced under [28 U.S.C.] §1331 in the district court provided there is an independent waiver of sovereign immunity outside the Tucker Act.

Sanders, 903 F.2d at 119. The court explained:

> "Most claimants against the government rely on the Tucker Act for the waiver of sovereign immunity that would otherwise preclude their suits. When such a claimant attempts to sue in a district court . . . he encounters the Tucker Act's $10,000 maximum, and his claim therefore fails as an unconsented suit against the sovereign. Hence it is commonly said that suits against the government for more than $10,000 are in the exclusive jurisdiction of the Court of Claims. . . . *In fact, the jurisdiction of the Court of*

> *Claims is not exclusive; rather, there is rarely any statute available that waives sovereign immunity for suits in the district court, other than the Tucker Act with its $10,000 limit."*

Id. (quoting *Ghent v. Lynn*, 392 F. Supp. at 881 (citations omitted)) (emphasis in *Sanders*). *See also Bowen v. Massachusetts*, 487 U.S. 879, 910 n.48 (1988) (Claims Court jurisdiction is exclusive "only to the extent that Congress has not granted any other court authority to hear the claims that may be decided by the Claims Court."); *Western Sec. Co. v. Derwinski*, 937 F.2d 1276, 1279 (7th Cir. 1991) (same). Thus, a district court's first inquiry is not to determine the source of the funds sought by plaintiff, *see supra*, but to determine whether statutes outside the Tucker Act can provide plaintiff with an independent grant of subject matter jurisdiction and a waiver of sovereign immunity. *Sanders*, 903 F.2d at 117. This court will now undertake that inquiry.

Plaintiff seeks subject matter jurisdiction under 28 U.S.C. §1331, which states: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, law, or treaties of the United States." It claims that this action arises under 42 U.S.C. §1437f, pursuant to which the HAP contract was formed, and federal common law. The court agrees. "Suits to enforce contracts with federal agencies are governed by federal common law . . . and as a result arise under federal law for purposes of section 1331." *Derwinski*, 937 F.2d at 1280 (citations omitted). *See FHM Constructors*, 779 F. Supp. at 680-81 (finding subject matter jurisdiction under §1437 and other statutes).[1] Accordingly, the court concludes that it has subject matter jurisdiction over this suit.

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[1] *But see 1610 Corp. v. Kemp*, 753 F. Supp. 1026, 1030-32 (D. Mass. 1991) (concluding that contract action does not arise under federal law for purposes of §1331 jurisdiction).

That brings me to the question whether HUD has consented to suit in the district court. Plaintiff relies on 42 U.S.C. §1404a, which states in part: "The Secretary of Housing and Urban Development *may sue and be sued* only with respect to its functions under the United States Housing Act of 1937, as amended [42 U.S.C.A. §1437 *et seq.*] . . . ." (emphasis added). There is little doubt that plaintiff's suit, which is based on its HAP contract with HUD, is a suit "with respect to [HUD's] functions under" 42 U.S.C. §1437 *et seq.* Accordingly, the court holds that §1404a provides a waiver of sovereign immunity permitting plaintiff's suit *against HUD* in this court. At least two courts have drawn an identical conclusion based on §1404a. *FHM Constructors,* 779 F. Supp. at 681-82; *Lattimore,* 1992 WL 118383.

The above holdings do not, however, end the court's analysis. In fact, they merely bring the court to the juncture that distinguishes the Second Circuit's analysis in *Sanders* from that of most other circuits in the country. In *Sanders,* the court asked *first* whether jurisdiction existed. Having concluded that it did, it reversed the district court's contrary conclusion and remanded for a determination on the merits. *Sanders,* 903 F.2d at 120. The *Sanders'* court then added this critical instruction on remand:

> If the court determines that HUD is liable for the arbitration award, it need not engage in a further analysis of the source of the funds that would be used to satisfy its judgment—i.e., from general Treasury funds or funds within the discretion and control of the Secretary. The court should simply direct the Secretary to satisfy the judgment out of funds that are within his control, assuming, of course, that such funds exist. It is only as to such funds that the Secretary's immunity has been waived. *See F.H.A. v. Burr,* 309 U.S. 242, 250-51 (1940); *Silberblatt, supra,* 608 F.2d at 36.

Sanders, 903 F.2d at 120. *See also Far West Fed. Bank v. Director, Office of Thrift Supervision*, 930 F.2d 883, 890 (Fed. Cir. 1991); *Ensign Fin. Corp. v. Federal Deposit Ins. Corp.*, 785 F. Supp. 391, 401 (S.D.N.Y. 1992); *FHM Constructors*, 779 F. Supp. at 681. Thus, under *Sanders*, a district court deciding whether jurisdiction exists need never determine the source of funds sought to be recovered by plaintiff in its action; whereas, in most other circuits, this is the first question that is asked. *See, e.g., Amoco Prod. Co.*, 815 F.2d at 359; *Weeks Constr., Inc.*, 797 F.2d at 675 & n.9; *Portsmouth Redevelopment & Hous. Auth.*, 706 F.2d at 473.

This difference is critical to a determination whether a claim may be brought in district court, or must be brought in the Claims Court. If a court first asks—where are the funds to satisfy judgment likely to come from, the agency or the federal treasury?—and decides the answer is the latter source, then the suit is considered to be against the United States and must be transferred to the Claims Court, because no independent waiver of sovereign immunity exists, outside the Tucker Act, for claims *against the United States*. This is the approach taken by the circuits cited at the beginning of this discussion. *See, e.g., Amoco Prod. Co.*, 815 F.2d at 359; *Weeks Constr., Inc.*, 797 F.2d at 675 & n.9; *Portsmouth Redevelopment & Hous. Auth.*, 706 F.2d at 473.[2] In *Sanders*, on the other hand, the Second Circuit proceeded on the assumption that the suit was against the Secretary of HUD, not against the United States, and asked whether *HUD* had waived its sovereign immunity.

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[2] Indeed, there is precedent in the Second Circuit which would hinge the waiver of sovereign immunity on an initial determination whether the action was against the agency or against the United States. *Falls Riverway Realty*, 754 F.2d at 55-56.

The court concluded that HUD had waived its immunity, and thus held that jurisdiction was proper in the district court. *Sanders*, 903 F.2d at 119-20. The court, however, then noted that the scope of HUD's waiver of immunity was limited by the extent to which the Secretary could satisfy a judgment "out of funds that are within his control, *assuming, of course, that such funds exist.*" *Id.* at 120 (emphasis added). *See also Silberblatt*, 608 F.2d at 36 ("For a claim to be against the Secretary, and therefore within the scope of the 'sue and be sued clause,' as opposed to a suit against the United States, any judgment for plaintiff must be out of funds in the control of the Secretary as distinguished from general Treasury funds."). If HUD has no funds "severed from Treasury funds and Treasury control," *F.H.A. v. Burr*, 309 U.S. at 250, plaintiff will simply be unable to collect, even if, ultimately, it is successful in winning a judgment against HUD. *C.H. Sanders Co., Inc. v. BHAP Hous. Dev. Co.*, 910 F.2d 33, 33 (2d Cir. 1990); *Far West Fed. Bank*, 930 F.2d at 890; *Ensign Fin. Corp.*, 785 F. Supp. at 401 n.5.[3]

The distinction offered by *Sanders* also disposes of language in §1346(a)(2) which divests jurisdiction from a district court for "any civil action or claim against the United States founded upon any express or implied contract with the United States ...." 28 U.S.C. §1346(a)(2). *See Chemung County v. Dole*, 781 F.2d 963, 967 (2d Cir. 1986) ("The Contract Disputes Act (CDA) of 1978, 41 U.S.C. §601 *et seq.* (1982), amended the Tucker Act, 28 U.S.C. §1491 (1982), and removed district court

[3] Although the court takes no position at this time as to whether HUD has access to funds severed from treasury control, other courts have apparently drawn opposite conclusions on this point. *Compare Portsmouth Redevelopment & Hous. Auth.*, 706 F.2d at 473-74 (holding that there is no separate fund within HUD's control), *with Lattimore*, 1992 WL 118383 (noting plaintiff's identification of a separate HUD fund).

jurisdiction over actions or claims against the United States, regardless of the amount in controversy, when founded upon an express or implied fact contract with the federal government."). Here, the suit is against HUD, not the United States. Recovery may be made only against the former entity, not the latter.

For the foregoing reasons, the court holds that it has subject matter jurisdiction, defendant HUD has waived its sovereign immunity, and, pursuant to plaintiff's amended complaint, the suit may proceed in this court.

The court will meet with counsel on August 18, 1992, at 9 a.m. to be advised as to what further steps shall be taken in this litigation.

So ordered.

s/ JOHN T. CURTIN
John T. Curtin
United States District Judge

Dated: August 10, 1992

Excerpt of Amended Complaint,
Dated November 15, 1990.

* * *

[8] agency action to which plaintiff was entitled and to perform the housing assistance payments contract as modified between the parties.

DATED: Buffalo, New York
November 15, 1990

Yours, etc.

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PLEASE TAKE NOTICE that the plaintiff demands a jury trial of the causes of action contained in the within action.